Social Contract Neutrality and the Religion Clauses of the Federal Constitution

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I. INTRODUCTION

"Neutrality" has become the slogan that the Supreme Court uses for judging all claims of freedom of religion whether under the Establishment Clause or the Free Exercise Clause.[1] However, the word "neutrality" conceals the Court's inconsistent use of the concept. Thus, in *Rosenberger v. Rectors of the University of Virginia*,[2] the recent debate about funding for religious publications, both the majority and the dissent asserted that only their approach was truly neutral.[3]

This inconsistency in the meaning of neutrality in the religion clauses is merely part of a general inconsistency in the Court's treatment of the religion clauses. Some of these conflicts are between the Establishment and Free Exercise Clauses. The Court's Establishment Clause cases evince a concept of neutrality that prohibits laws with non-neutral effects,[4] while the Court's Free Exercise Clause cases allow non-neutral effects.[5] Taxpayers may challenge the use of the government's money to support religion[6]; however, they may not challenge the government's donation of a 77-acre tract of land and buildings to the Valley Forge Christian College.[7] The Court even says that the Free

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[1] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. For cases expressly applying a neutrality analysis, compare, e.g., Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (Establishment Clause) with Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–42 (1993) (Free Exercise Clause) and Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (Free Exercise Clause).

[2] 115 S. Ct. 2510 (1995).

[3] *See Id.* at 2522 ("The governmental program here is neutral toward religion."); *id.* at 2525 (O'Connor, J., concurring) (describing neutrality of program and stating, "Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities."); *id.* at 2528 (Thomas, J., concurring) (describing "long tradition of allowing religious adherents to participate on equal terms in neutral government programs"); *id.* at 2541 (Souter, J., dissenting) ("[T]he issue [is] whether a law is truly neutral with respect to religion (that is, whether the law either 'advance[s] [or] inhibits religion.'")) (quoting Allegheny County v. ACLU, 492 U.S. 573, 592 (1989)).

[4] *See, e.g., Thornton*, 472 U.S. at 710.

[5] *See Lukumi Babalu Aye*, 508 U.S. at 531; *Smith*, 494 U.S. at 878.

[6] *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

[7] *See* Valley Forge Christian College v. Americans United for Separation of Church & State Inc., 454 U.S. 464 (1982).

Exercise Clause itself conflicts with the Establishment Clause.[8]

These inconsistencies are not confined to differences between establishment and free exercise. There are also inconsistencies between those clauses and closely related constitutional provisions. The Court's intent-based test under the Free Exercise Clause allows exemptions;[9] the Equal Protection cases on which the Court's *Employment Division v. Smith* opinion relied for the intent test do not.[10] The Court relies on Jefferson's and Madison's support for freedom of religion in free speech cases.[11] The author of the most recent of these opinions has argued that Jefferson's and Madison's support for freedom of religion is irrelevant in freedom of religion cases.[12] Coercion is not an element of a free speech case;[13] coersion is an element of a free exercise case.[14]

These inconsistencies demonstrate not only the ambiguity of the word "neutrality,"[15] but also the lack of any agreement on the appropriate techniques for interpreting the word. This Article seeks to supply the omission by arguing that the Court should interpret the idea of "neutrality" in the Free Exercise and Establishment Clauses according to the Framers' and ratifiers' understanding of the federal Constitution as a social contract.[16] According to this social contract

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[8] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

[9] *See Smith*, 494 U.S. at 886 n.3 (citing Washington v. Davis, 426 U.S. 229 (1976) (adopting an intent-based test for the Equal Protection Clause)).

[10] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); *id.* at 520 (Scalia, J., concurring).

[11] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 & n.31 (1977); Keller v. State Bar, 496 U.S. 1, 10 (1990).

[12] *See* Wallace v. Jaffree, 472 U.S. 38, 98–99 (1985) (Rehnquist, J., dissenting).

[13] *See* Buckley v. Valeo, 424 U.S. 1, 11–12 & n.11 (1976) (allowing New York Civil Liberties Union and other public interest groups standing to challenge governmental expenditures under the Free Speech Clause).

[14] "'[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.'" Board of Educ. v. Allen, 392 U.S. 236, 248–49 (1968) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

[15] "Neutrality can be defined in quite different ways," and "the term *neutrality* is unfortunate; [because] some of its connotations are highly misleading, others suggest altogether impractical principles." JOHN RAWLS, POLITICAL LIBERALISM 191 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 208 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE] ("It may be said against the principle of equal liberty that religious sects, say, cannot acknowledge any principle at all for limiting their claims on one another.").

[16] Numerous authors have reviewed the religious beliefs of the Framers for insight into how they would have liked the Constitution to affect the government's ability to aid or interfere with religion. However, no one has examined the overall contractarian approach

theory, the government was created to protect pre-existing rights and acquired its powers by succeeding to some of the rights of the people that formed it.[17]

This view has two important consequences. First, the government cannot favor or disfavor individuals on the basis of religion. This is because individuals' possession of religious views in the state preceding the formation of the government did not create rights against one another. Because the government succeeded to the rights of the individuals, the government likewise did not have rights against individuals. This prohibits government discrimination and favoritism. It also prohibits the use of government resources to promote religion, because promotion would allow the government to take the money from some citizens to support the views of others, something that no one could have done before the formation of government.

Second, the government cannot prohibit conduct that does not affect others. This is because only conduct that affects others interferes with someone's rights. Thus, the burning of ceremonial candles and the consumption of sacramental wine or peyote were protected from state intervention. Moreover, the Framers did not believe that a person's rejecting or ignoring the religious views of others invaded their rights. Thus, blasphemy, heresy, and the like were utterly beyond state regulation.

In the Framers' view, this achieved complete protection of religious rights. The government could not discriminate in favor of or against individuals on the basis of their religious views. And, because the Framers believed that true religion did not invade the rights of others, the ban on government regulation of conduct that did not affect others provided full protection for religious practice.

Interpreting the religion clauses according to the Framers' view has many advantages. It eliminates the conflict between the clauses: the Framers believed using governmental powers to support religious claims would illegitimately use the government to provide favors to the politically powerful that they could not have obtained before the formation of the government. It explains why religious rights were "inalienable": the Framers believed they had written a

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for its implications for religious liberty. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-3 to -5 (2d ed. 1988); Ashby D. Doyle II, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence*, 3 SETON HALL CONST. L.J. 55, 83-91 (1993) (discussing views of Anne Hutchinson, Roger Williams, James Madison, and the effect of the Great Awakening); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty v. Equality*, 1993 BYU L. REV. 7.

[17] *See infra* note 32.

Constitution that would fully protect all legitimate religious claims. It explains why religious rights were thought to be implicit in the original Constitution: the Framers believed that the limitation on the purpose of government meant that the government could neither discriminate on the basis of religion nor prohibit conduct that did not affect others.

II. THE SOCIAL CONTRACT VIEW OF GOVERNMENT

A theory of neutrality requires a definition of the "neutral" point from which deviations are prohibited.[18] The common understanding of the Framers, ratifiers, and the public at the time of the adoption of the Constitution and the Bill of Rights was that these documents embodied a social contract theory of government.[19] Under such a theory, the purpose of the government was not to create rights, but rather to enforce pre-existing rights. That implies two components to neutrality. First, because no one in the pre-existing society could make or defend a claim against others on religion, whether the religion of the claimant or the religion of the person against whom the claim was made, the government could not do so either. Second, the government could not interfere with private conduct unless that conduct affected others. This was so even if the interference was not based on religion.

The social contract view has two consequences. First, limiting the government's power to intervene in cases where one individual threatens another's rights safeguards individual liberties. Second, prohibiting individuals from making claims on government resources prevents the government from promoting religion.

Some may argue that the social contract view is irrelevant to interpreting the Constitution.[20] To address the issue, I will show that at the time of the framing, the social contract view was used to advance claims of religious liberty and was ubiquitous in social discourse and constitution making. Alternative sources, such as the debates and post amendment practice, are

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[18] *See* RAWLS, A THEORY OF JUSTICE, *supra* note 15, at 260–63.

[19] *See* James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 4 [hereinafter Madison, Memorial and Remonstrance], *in* 2 JAMES MADISON, WRITINGS OF JAMES MADISON, 1783-1787 183–91 (Gaillard Hunt ed., 1901).

[20] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)) ("When the Framers did not discuss the precise question at issue, we have turned to 'what history reveals was the contemporaneous understanding of [the Establishment Clause's] guarantees.'"). By giving priority to the Framers' discussion, Justice Thomas's approach reverses the priority argued for here.

incomplete, contradictory, or have little relationship to the contemporary understanding of the religion clauses.

A. *Using the Framers' Social Contract Theories to Understand the Constitution*

1. *The Ubiquity of the Social Contract Perspective*

Social contract theory provided the background against which the Constitution and the Bill of Rights were adopted.[21] The colonists used this vision of society to justify claims of religious freedom at the time of the movement for independence.[22] This social contract theory defined their understanding of neutrality. The debates over the state and federal constitutions "were direct continuations of the discussions that had preceded Independence,"[23] and the same social contract principles were used to justify claims of rights in these debates.[24]

Because of this social contract theory, the Framers and the public at the time of the revolution and framing conceived governments as resulting from an agreement among people to provide a means for enforcing existing rights. In the words of the most famous of these statements, the *Declaration of Independence*, "Governments are instituted among Men," not to create new rights, but "to secure rights" already existing.[25] Through these agreements

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[21] *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 164–66 (1991).

[22] *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 246–72 (1967).

[23] *Id.* at 231; *see also* VA. CONST. art. I; OSCAR HANDLIN, THE AMERICANS 164 (1963).

[24] *See* 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1789) (statement of Rep. Madison, June 8, 1789) [hereinafter 1 ANNALS] (distinguishing between natural rights, inherent in the very nature of the compact, and positive rights, resulting from the terms of the agreement, and considering rights to freedom of religion and expression as natural rights). For example, the *Federalist Papers* repeatedly restricted governmental power where it was "contrary to the first principles of the social compact." THE FEDERALIST No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961) (bills of attainder, ex post facto laws, and laws impairing the obligation of contracts); *see also id.* No. 43, at 279 (James Madison) (referring to principles of the compact); *id.* No. 51, at 323–25 (James Madison). *See generally* DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989) (arguing that the Framers were contractarians).

[25] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also, e.g.*, Madison, Memorial and Remonstrance, *supra* note 19, at ¶ 4; Everson v. Board of Educ., 330 U.S.

creating governments, individuals surrendered their power to enforce their rights themselves, but retained other rights that were thought to be inalienable.[26]

The social contract theory and the language of inalienable rights were used to justify objections to religious exactions. In the most famous of these debates, over the Virginia Assessment Bill from 1784 to 1785, Madison wrote his widely circulated *Memorial and Remonstrance*.[27] The *Memorial* argued, "If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society . . . as relinquishing no more, and therefore retaining no less, one than another, of their natural rights."[28] "[E]very man who becomes a member of any particular civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign."[29] "[I]f religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body."[30]

This social contract view was reflected in *The Federalist Papers*, written to advocate the adoption of the federal Constitution.[31] The same social contract language was echoed in many of the state constitutions extant at the time of the adoption of the Bill of Rights. Typically, these constitutions described the religious rights as inalienable, and therefore incapable of being surrendered.[32]

1, 64 (1947) (appendix to Justice Rutledge's dissent); Walz v. Tax Comm'n, 397 U.S. 664, 719 (1970) (appendix II to Justice Douglas's dissent); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, ch. IX (6th ed. 1764) [hereinafter LOCKE, THE SECOND TREATISE OF GOVERNMENT]. *Cf.* JOHN LOCKE, A LETTER CONCERNING TOLERATION 72 (Prometheus Books 1990) (1689) [hereinafter LOCKE, A LETTER CONCERNING TOLERATION] ("natural rights . . . are not forfeitable upon account of religion"). On the influence of the *Declaration* on popular opinion, see HANDLIN, *supra* note 23 , at 141–42, and on the widespread nature of legal learning, see DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 205 (1958).

[26] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (governments derive their just powers from the consent of the governed); *see also* THE FEDERALIST No. 2, at 37 (John Jay) ("Nothing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers."). *Cf.* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 226 (no citizen should have the right to delegate power to the government to decide constitutional essentials).

[27] Memorial, Memorial and Remonstrance, *supra* note 19, at ¶ 4.

[28] *Id.* (quoting VA. CONST. art. I).

[29] *Id.* at ¶ 1.

[30] *Id.* at ¶ 2.

[31] *See* THE FEDERALIST No. 2 (John Jay), Nos. 43, 44, 52 (James Madison).

[32] *See* DEL. CONST. DECLARATION OF RIGHTS §§ 1, 2 (1776) (government "is founded in compact only" and the religious rights were "natural and unalienable"); MD. CONST.

Sometimes, they also expressly adopted the social compact theory of the creation of government.[33]

The social contract view also informed the debates in the House over the religion clauses, which describe the Bill of Rights as a means of preventing the government from interfering with inherent rights.[34] Representative Benson declared, "The committee who framed this report [proposing amendments] proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government."[35] The representatives recognized that the Bill of Rights was needed to respond to criticism from the states against the unrestrained power of the federal government.[36]

The pervasive adherence to the social contract view makes it appropriate to consider that view in interpreting the Bill of Rights. In addition, as the state constitutions show, social contract ideas were used to limit the power of the state governments.[37] *A fortiori*, the limitations those constitutions placed on

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Declaration of Rights, art. I (1776); MASS. CONST. preamble & Pt. 1 (Declaration of Rights), art. III, para. I, II, VII (1780) (unalienable rights; government is instituted for the benefit of the people); N.H. CONST. Pt. I, art. I–V (1784) (men have natural rights; government is founded on the consent of the people to give up some rights in exchange for others, but the natural rights of religion are unalienable because no equivalent can be given for them); N.Y. CONST. art. I (1777); New York Ratification of Constitution (July 26, 1787) (power is originally vested in the people; religious rights are unalienable); N.C. CONST. art. I (1776); PA. CONST. DECLARATION OF RIGHTS, art. II, V (religious rights are unalienable; government is instituted for the benefit of the people) (1776); VT. CONST. OF 1786, ch. 1, art. III (natural and unalienable right to worship); VA. DECLARATION OF RIGHTS, ¶ 1 (1776) (rights cannot be surrendered on entering into society); Virginia Ratifying Convention (June 27, 1788) (natural rights of which men cannot be deprived in a social compact). *Cf.* LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 25, at 72 ("natural rights . . . are not forfeitable on account of religion").

[33] *See* DEL. CONST. DECLARATION OF RIGHTS § 1 (1776); N.H. CONST. Pt. I, art. III (1784); VA. DECLARATION OF RIGHTS, ¶ 1 (1776).

[34] We do not have the Senate debates because the Senate met behind closed doors. *See* 1 ANNALS, *supra* note 24, at 738 (statement of Rep. Madison, Aug. 15, 1789); McConnell, *supra* note 16, at 1483.

[35] 1 ANNALS, *supra* note 24, at 31–32 (statement of Rep. Benson, Aug. 15, 1789); *see also id.* at 437 (statement of Rep. Madison, June 8, 1789) (distinguishing between natural rights, inherent in the very nature of the compact, and positive rights, resulting from the terms of the agreement, and considering rights to freedom of religion and expression as natural rights).

[36] *See id.* at 424–42 (statement of Rep. Madison, June 8, 1789); Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 242, 250 (1833) (Marshall, C.J.).

[37] *See supra* note 32.

state governments should apply to the limited, federal government.[38] As Madison observed, "If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government."[39]

2. *The Unreliability of the Debates*

In interpreting the Bill of Rights, the social contract view provides important advantages over the debates. First, we know very little about the debates. The only debates we know about were in the House of Representatives. We know nothing about the Senate debates, because the Senate met behind closed doors.[40] "[W]e know practically nothing about what went on in the state legislatures during the ratification process."[41]

Second, even if we could safely rely on the debates we do have, the statements of the first Congress do not resolve the conflicts about the meaning of the religion clauses. For example, those interpreting the clauses have disputed the Framers' intent on such fundamental issues as whether the clauses require, permit, or prohibit exemptions.[42] They have disputed whether the Establishment Clause protects against federal establishments or merely prevents the federal government from interfering with state establishments.[43] This is particularly so for the Establishment Clause, because of circular definitions in the debates—when Madison was asked the meaning of the phrase "no religion

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[38] Indeed, Madison expressly stated that "every Government should be disarmed of powers which trench upon those particular rights" including the "equal right of conscience[.]" 1 ANNALS, *supra* note 24, at 440–41 (statement of Rep. Madison, June 8, 1789).

[39] *Id.* at 438.

[40] *See id.* at 738; McConnell, *supra* note 16, at 1483.

[41] 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1171 (1971); *see also* McConnell, *supra* note 16, at 1485.

[42] *Compare* McConnell, *supra* note 16 (the Free Exercise Clause requires exemptions) *and* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (same) *with* Hamburger, *supra* note 16 (exemptions are permitted but not required) *and* PHILIP B. KURLAND, RELIGION AND THE LAW 18 (1962) (exemptions are prohibited).

[43] *Compare* Lee v. Weisman, 505 U.S. 577, 587 (1992) *with* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1159 (1991) (the Free Exercise Clause should be incorporated, but not the Establishment Clause). *See also* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992); *infra* note 245.

shall be established by law,"[44] Madison returned to the idea of establishment, saying that he believed it meant "that Congress should not establish a religion."[45] In short, the debates themselves are too equivocal to resolve this issue, without substantial evidence extrinsic to the drafting process to explain what the legislators meant.[46] This evidence is what the social contract view provides.

Third, the debates are of dubious value because they were not shared with the public during the ratification process. Because ratification was essential for enacting a constitutional amendment, the statements of members of Congress are less relevant than they would be in interpreting a statute.[47] This is especially true of the Bill of Rights, because the impetus for them was the dissatisfaction that the people expressed during the states' ratification of the original Constitution.[48] The ratifiers did not know even the House debates. By contrast, the social contract view was widely shared.

The public documents circulating at the time of the drafting of the Constitution and the Bill of Rights are a better guide to the understanding of the times than the inarticulate and perhaps inconsistent statements of individuals about how particular cases were to be resolved.[49] Using the public debates

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[44] 1 ANNALS, *supra* note 24, at 729 (statement of Rep. Madison, Aug. 15, 1789). The second part of the clause at that time continued, "nor shall the equal rights of conscience be infringed." *Id.*

[45] *Id.* at 730 (statement of Rep. Madison, Aug. 15, 1789). Madison's definition continued that "[Congress should not] enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* Thus, the part of the definition that is most helpful relates to the "equal rights of conscience," which received the greater change in the drafting process.

[46] This is because "[l]anguage is a social institution. Its successful functioning depends upon commonly accepted responses to particular verbal symbols used in particular kinds of contexts. These responses are social facts." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1188 (1994). *See generally* ROBERTO M. UNGER, KNOWLEDGE & POLITICS 112–13 (1975); Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

[47] "In the case of a constitutional amendment [a statement in debate] is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions . . . ." Maxwell v. Dow, 176 U.S. 581, 602 (1900).

[48] *See* 1 ANNALS, *supra* note 24, at 429–33 (statement of Rep. Madison, June 8, 1789); Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 242, 250 (1833) (Marshall, C.J.). *Cf. Maxwell*, 176 U.S. at 607 (Harlan, J., dissenting) (implied pledge to adopt a Bill of Rights).

[49] *See* BAILYN, *supra* note 22, at 44 n.31.

avoids the need to infer a connection between the secret, internal legislative debates and the views of the public.[50] Such public discussions therefore should receive great weight in interpreting the Constitution. For example, *The Federalist Papers* directly influenced debates in New York (where it was written), in the surrounding states, and in Virginia, where copies of *The Federalist Papers* "were rushed . . . Hamilton's direction and used gratefully by advocates of the Constitution in the climactic debate over ratification."[51] Washington praised it early,[52] Jefferson later described its value,[53] and Story cited it almost constantly in his *Commentaries*.[54] Its wide circulation suggests that the social contract approach to government was widely shared. Madison's widely circulated description of a law requiring people to contribute three pence to the support of their own church as an establishment likewise suggests that the ratifiers understood "establishment" to encompass a variety of provisions for religion less formal than a state church.[55]

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[50] *See* HART & SACKS, *supra* note 46, at 1379 ("Evidence of specific intention [in the internal legislative history] with respect to particular applications is competent only to the extent that the particular applications illuminate the general purpose and are consistent with other evidence of it."); *id.* at 1378 ("The gist of this approach is to infer purpose by comparing the new law with the old."). *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134–35 (1977) (constitutional rights are not confined to specific examples imagined by the Framers, but examples are helpful in illustrating general concepts protected by the Bill of Rights).

[51] THE FEDERALIST xi (Clinton Rossiter ed., 1961).

[52] *See* Letter from George Washington to Alexander Hamilton (Aug. 28, 1788), *reprinted in* 30 THE WRITINGS OF GEORGE WASHINGTON 65, 66 (John C. Fitzpatrick ed., 1939).

[53] Thomas Jefferson wrote that "appeal [to The Federalist] is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution of the United States, on questions as to its genuine meaning." THOMAS JEFFERSON, THE COMPLETE JEFFERSON 1112 (Saul K. Padover ed., 1943). *See also* CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 52 (1964); Ernest J. Brown, Book Review, 67 HARV. L. REV. 1439, 1445–46 (1954).

[54] *E.g.*, JOSEPH STORY, *Rules of Interpretation of the Constitution*, *in* 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 448, at 319–20 (1858) (citing THE FEDERALIST No. 83); *id.* § 452, at 322 n.2. Story's citation is significant because he shares, with the Supreme Court, a limited role for interpretation through extrinsic evidence. *Compare id.* § 440, at 313 n.1 (citing 1 SIR WILLIAM BLACKSTONE, COMMENTARIES *59, 60) (using a *Heyden's Case* formulation) *with*, *e.g.*, Bank of the United States v. Lee, 38 U.S. (13 Pet.) 107, 118 (1839) (citing *Heyden's Case*).

[55] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 & n.31 (1977) (quoting 2 JAMES MADISON, THE WRITINGS OF JAMES MADISON 186 (quoting Virginia Act for Establishing Religious Freedom, Preamble, 12 VA. STAT. 84 (Hening 1823), *reprinted in* 1

For all these reasons, judges at the time of the framing would use public documents, but not debates, to interpret ambiguous statutes, because public documents showed the circumstances surrounding the enactment.[56] Thus, to the extent that the Framers had an expectation about how the Constitution should be construed, it was that the subjective intent of the Framers should be disregarded. Rather, the Framers intended interpreters to rely on the text, but could in the case of ambiguity also consider public circumstances surrounding an enactment to discern its purpose and construe it accordingly.[57]

3. *The Unreliability of Post Enactment Evidence*

Post enactment evidence suffers from the same defects as the debates and has two additional defects of its own. First, it does not reveal the contemporaneous intent of the parties. Second, a constitution is intended to limit actions by presidents, senators, and representatives.

The limiting function of the Constitution means that when a president, senator, or representative acts in a way that the Constitution prohibits—especially when that prohibition was enacted under state pressure, as the Bill of Rights was—it should no more puzzle us than a party's doing something prohibited by a contract it signed. The Framers themselves were familiar with this phenomenon. As Madison observed during the debate over the Bill of Rights, the state legislatures had disregarded many of the state constitutions.[58] Madison himself subsequently explained that he recommended a day of thanksgiving because of "political" pressure, despite his belief that it was unconstitutional.[59] To use the conduct of the Congress or the President as

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ANSON STOKES, CHURCH AND STATE IN THE UNITED STATES 392 (1950))).

[56] *See* Heyden's Case, Co., 7a, 76 Eng. Rep. 637, 638 (Ex. 1584); 1 WILLIAM BLACKSTONE, COMMENTARIES *59–62. This was also the early American doctrine. Even when the Supreme Court held that a statement "urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it[,]" it endorsed reliance on the "condition of affairs out of which the occasion for its adoption may have arisen[.]" Maxwell v. Dow, 176 U.S. 581, 601, 602 (1900).

[57] *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 904, 948 (1985) (concluding that the Framers intended interpreters to rely on the text, not on the intent of the Framers, but would resort to extrinsic evidence).

[58] *See* 1 ANNALS, *supra* note 24, at 439 (statement of Rep. Madison, June 8, 1789). *See also* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 852 (1986).

[59] *See* Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in*

evidence of the meaning of the Bill of Rights is to attribute to them more political virtue than their contemporaries in state government exercised, more than the very concept of a Bill of Rights presupposed, or indeed more than their own statements show that they in fact exercised.

Again, as with the debates, the post enactment conduct does not resolve the issue. Jefferson and Madison, the two presidents most closely connected with the religion clauses, rejected the idea of public promotion of religion, even to the extent of believing that thanksgiving proclamations violated the separation of church and state. Jefferson refused on separationist grounds to issue thanksgiving proclamations.[60] Although Madison issued a proclamation, he confessed in 1817, after leaving office, that these proclamations violated the principles of separation for which he stood but explained—consistent with Locke's views—that he thought this permissible because the proclamations were "merely recommendatory"[61] and because the Constitution was not concerned with trifles.[62] Presidents Washington and Adams, on the other hand, "recommended" days of "public thanksgiving and prayer," although some of these preceded the adoption of the First Amendment.[63]

Perhaps for these reasons, the Supreme Court has treated post enactment evidence inconsistently. It ignored the evidence that numerous state constitutions with free exercise clauses also contained clauses preventing clergy from sitting in the legislature.[64] That evidence would have led the Court to conclude that the Framers and ratifiers understood the federal Constitution's

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5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 105 (1987).

[60] *See* Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *reprinted in* 5 KURLAND & LERNER, *supra* note 59, at 98–99.

[61] "Recommended" was apparently thought to make a difference with respect to the separation of church and state. *See* Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808) (noting that Reverend Miller only asked that Jefferson "recommend" a day of thanksgiving), *reprinted in* 5 KURLAND & LERNER, *supra* note 59, at 98–99.

[62] *See* Elizabeth Fleet, *Madison's "Detached Memoranda"*, 3 WM. & MARY Q. 534, 559 (1946), *reprinted in* 5 KURLAND & LERNER, *supra* note 59, at 105; *see also* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 100 (1986).

[63] *See* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE 53 (1982); 5 KURLAND & LERNER, *supra* note 59, at 98–99.

[64] *Compare* McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating a statute prohibiting ministers from serving in the legislature) *with* GA. CONST. art. LVI, LXII (1776) (respectively allowing "[a]ll persons . . . free exercise of their religion," but excluding clergymen from the legislature); GA. CONST. art. 10 § 5, art. 1, § 18 (1789) (same); N.Y. CONST. art. XXXVIII, XXXIX (1777) (likewise allowing "free exercise," but excluding clergy from legislature); N.C. CONST. art. XIX, XXXI, XXXIV (1776) (guaranteeing freedom of worship, and nonestablishment, but excluding clergy from legislature).

Free Exercise Clause to be consistent with such prohibitions. It has also ignored the Alien and Sedition Acts in interpreting the Free Speech Clause.[65] On the other hand, it relied on the first Congress's hiring of a chaplain to justify state legislatures' hiring legislative clergy.[66]

The inconsistency in the Court's treatment suggests that the Court uses this as a makeweight rationale to justify a result that it has already reached on other grounds. The small additional information that post enactment evidence provides cannot overcome the flaw in its use: interpreting the Constitution based on the belated actions of those whom the Constitution deemed untrustworthy and sought to restrain. Using the conduct of such persons to interpret the Constitution is little more sensible than using the conduct of prisoners to interpret prison regulations. Certainly, such evidence should not contradict the public, contemporaneous intent of the ratifiers and drafters, who were the ones attempting to impose the restraint.

4. *The Necessity of a Social Contract View in Adjudicating Religious Rights*

In addition to the practical and theoretical problems with relying on the debates and post enactment evidence, there are affirmative reasons for using fundamental doctrines, like the social contract theory of the Framers. Specific statements in debates and examples of post enactment conduct are not always based on the reflective consideration about the implications of general principles, which often take many years to achieve expression or recognition. Thus, although the United States was dedicated to the proposition that all men are created equal, it took many years and a civil war for that proposition to become accepted law, and even longer for some measure of political equality to be extended to women. The reliance in some judicial opinions on specific statements rather than inferences from general principles has caused judicial disasters.[67]

Moreover, resort to fundamental issues may be the only way to resolve the conflict. Abstraction "is a way of continuing public discussion when shared

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[65] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964).

[66] *See* Marsh v. Chambers, 463 U.S. 783, 790 (1983).

[67] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1856) (conceding that a guarantee of equality "would seem to embrace the whole human family," but refusing to apply it to "the enslaved African race" because Africans "were never thought of or spoken of except as property" by "the men who framed this declaration"). The *Dred Scott* decision helped precipitate the Civil War. *See* JAMES M. MCPHERSON, THE BATTLE CRY OF FREEDOM 178, 183, 188 (1988).

understandings of lesser generality have broken down. We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots."[68] Specific desires of people today are in great conflict. To obtain a consensus, it may be necessary to rely on inferences from principles about which there is no conflict.

Finally, relying on the social contract view in this context is immune from two competing criticisms that have been advanced against this view in other contexts. On the one hand, the social contract has been criticized as too theoretical and unrelated to real people's needs to create duties. On the other hand, the social contract view has been criticized as being too tied to people's existing interests to make it a proper basis for inferring principles of justice.

The first of these criticisms have been advanced by Hume and others, who claimed that Locke's social contract view would not bear the weight that Locke put on it. Hume argued that the obligation to adhere to the contract required a society and rules of justice that could not exist before the contract.[69] Others have argued that the abstract description of the person in the idealized social contract view means that the hypothetical consent of that person does not create moral duties for real people.[70] However, neither of these criticisms applies to the federal Constitution. Because society and state government existed before the contract to form the federal government, this application of the social contract is real, rather than ideal.

The second branch of criticism is that a social contract theory based on a real contract is too "affected by contingencies and accidents" to provide a basis for concluding that the contract is just merely because people consented to it.[71] However, the Constitution, for better or worse, reflects the specific intent of the people who adopted it, and although it may have been affected by contingencies, the religion clauses have generally been interpreted in light of these contingencies.[72] Indeed, even some of those who find actual social

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[68] RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 46.

[69] *See* 3 DAVID HUME, OF THE ORIGINAL CONTRACT, *reprinted in* PHILOSOPHICAL WORKS 455–56 (1964). For a partial response to this critique, see RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 347, which, like Locke, adopts a view that "persons are capable of a certain natural political virtue." *Id.*

[70] *See generally* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

[71] RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 287; *see also* G.W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 58–59, 70–71, 156–57, 186 (T.M. Knox trans., 1942) (criticizing contingency and the assumption that human beings could be conceptually isolated from society for purposes of the social contract).

[72] Numerous authors have considered the role of history and the influence of specific religious movements in advancing their interpretations of the religion clauses. *See, e.g.*, TRIBE, *supra* note 16 § 14-3 to -5; Hamburger, *supra* note 16; McConnell, *supra* note 16;

contracts suspect because of their dependence on the initial bargaining position of the parties may accept this social contract.[73]

A related possible objection is that the Lockean view may favor a "status quo neutrality."[74] In other contexts, some have rejected the view that the common law status quo provides the neutral position, because that erroneously prohibits the redistribution of money to equalize preferred rights.[75] However, this critique of status quo neutrality has its greatest force in the area of free speech.[76] The role of free speech in politics may require redistribution so that the political system represents people, not money.[77]

Once a representative political system is guaranteed, the analogous justification for religious redistribution is much weaker, because it cannot threaten the political system. Even many who reject a historicist approach to determining free speech rights accept limits on redistribution to benefit people on the grounds of religion.[78] And, the Establishment Clause provides a text prohibiting government support for religion that has no equivalent in the Free Speech Clause.

Pepper, *supra* note 16, at 7.

[73] Even Rawls might accept the formation of the federal government as sufficiently voluntary to make the agreement to its formation a basis of justice, whether it is considered as a voluntary association or as the result of an agreement among sovereign states. First, Rawls and others agree that voluntary associations are not subject to the criticisms advanced against Locke's social contract. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 279; HEGEL, *supra* note 71, at 186. Second, Rawls believes that the difference principle outlined in his *Theory of Justice* does not apply as a general rule to differences in welfare between nations. *See* John Rawls, *The Law of Peoples*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, 75, 228 n.52 (Stephen Shute & Susan Hurley eds., 1993). The difference principle finds differences morally justified only to the extent that these differences benefit the welfare of the least well-off. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 15, at 75–83.

[74] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 4 (1993).

[75] *See id.* at 297.

[76] *See id.* at 197–256 (criticizing the application of status quo neutrality to speech issues).

[77] *See id.* at 84–85 (criticizing Buckley v. Valeo, 424 U.S. 1 (1976)); *see also id.* at 307–08; RAWLS, A THEORY OF JUSTICE, *supra* note 15, at 325 (wealth must be distributed evenly so as to avoid skewing the political process).

[78] *See* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 329–30, 341. In Professor Rawls's view, political liberties must have "fair value"—the ability, as a practical matter, to have an influence on the result—while other liberties need not. *Id.* at 327 & n.35. Professor Sunstein believes that political speech should receive primacy in free speech protections, *see* SUNSTEIN, *supra* note 74, at 256, so the need for redistribution to equalize political speech may be especially influential in construing the clause in all circumstances. *See also infra* Part II.B.2.b.

B. *The Social Contract View and American Religious Liberty*

Because of the pervasiveness of the social contract view, we must determine what those living at the time of the framing believed its implications were for the freedom of religion. In this respect, Locke's works were exceptionally influential, not just to the Framers,[79] but also to many Americans. "In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract . . . ."[80]

The exploration of Locke's views serves two purposes. The first is to show that the religious attitude held by the Framers is not adventitious, but follows from the basic premises of a social contract view. Second, the widespread circulation of Locke's views provides added weight to the contention that the understanding of the Framers on this point was shared by the public. For both these reasons, we can argue securely from the widespread adherence to a social contract view of the Lockean sort to the beliefs of the people at large about the permissible power of government. Moreover, early court decisions also show the influence of Lockean reasoning.[81]

The Framers' and Lockean social contract view has the important consequence that the Framers, because they believed that the government existed to secure inherent rights, allowed the government to interfere with someone's religious practices only when that interference was necessary to protect the rights of others. Similarly, the Framers necessarily rejected the contention that religious claims could justify invading the rights of others.

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[79] *See, e.g.*, THOMAS JEFFERSON, *Notes on Religion*, *in* 2 WRITINGS OF JEFFERSON 94, 99–103 (Paul L. Ford ed., 1893) (reproducing portions of Locke's *Letter Concerning Toleration* verbatim but without attribution); WILLIAM L. MILLER, THE FIRST LIBERTY 3–4, 64–65 (1985); LEO PFEFFER, RELIGIOUS FREEDOM 13 (1977) (similar); Lance Banning, *James Madison, the Statute for Religious Freedom, and the Crisis of Republican Convictions*, *in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 109, 118 (Merrill D. Peterson & Robert C. Vaughan eds., 1988); Robert A. Rutland, *James Madison's Dream: A Secular Republic*, *in* JAMES MADISON ON RELIGIOUS LIBERTY 199, 203 (1985); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 869 (1991) (similar parallelism for Madison).

[80] BAILYN, *supra* note 22, at 27; *see also id.* at 58–59 (discussing the American colonists' acceptance of social contract theory of government); RICHARDS, *supra* note 24, at 90 ("The American revolutionary and constitutional minds . . . framed their enterprises on the basis of Lockean political theory . . . ."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 282–91 (1969) (describing the increasing importance of Locke's social contract theory in American political thinking after 1776, especially in the drafting of state constitutions).

[81] *See infra* Part II.B.3.

Consequently, the government did not have the power to allow an individual to harm others, even if that individual claimed that his religious beliefs conferred a right to harm others. Finally, the social contract view implied that the line between permissible and impermissible governmental regulation was not the line between belief and action, but the difference between conduct that did not affect others and conduct that did.

1. *Religious Liberty, John Locke's Social Contract, and American Constitutionalism Before the Framing*

According to Locke, a magistrate could only seek "the temporal good and outward prosperity of the society."[82]

> [I]t does not belong unto the magistrate to make use of his sword in punishing every thing, indifferently, [including] . . . uncharitableness, idleness, and many other things . . . *because they are not prejudicial to other men's rights, nor do they break the public peace of societies.* Nay, even the sins of lying and perjury are nowhere punishable by laws; unless in certain cases, in which the real turpitude of the thing, and the offense against God, are not considered, *but only the injury done unto men's neighbors, and to the commonwealth.*[83]

Thus, "natural rights . . . are not forfeitable on account of religion."[84] Religion—even false religion—was outside the proper sphere of government, because it could not, by itself, injure one's neighbors. Locke wrote, "[R]eligion; which, whether it be true or false, does no prejudice to the worldly concerns of their fellow-subjects, which are the things that only belong unto the care of the commonwealth."[85] Therefore, he concluded, religion "has no relation to the end of civil government."[86]

The magistrate could not intervene even on the grounds that the individual's conduct was doing herself harm. "Laws provide," Locke said, "as much as is possible, that the goods and health of subjects be not injured by the fraud or violence of others; they do not guard them from the negligence or ill husbandry of the possessors themselves."[87] In a hypothetical case remarkably close to *Employment Division v. Smith*, Locke endorsed a result inconsistent with the result of the *Smith* Court, because he regarded "consuming [one's]

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[82] LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 25, at 59.

[83] *Id.* at 51 (emphasis added).

[84] *Id.* at 72.

[85] *Id.* at 60.

[86] *Id.*

[87] *Id.* at 35.

substance in taverns" as a "private domestic affair[]" as to which "every man may consider what suits his own conveniency, and follow what course he likes best."[88]

Because Locke so severely restricted the proper scope of government activity, he had little need for exemptions for religiously motivated conduct to protect religion. Thus, Locke's rejection of exemptions[89] must be read against his limitations on proper government, which meant that the government could not legitimately demand conduct that would violate claims of conscience, unless those claims of conscience interfered with other people's rights. Because, Locke concluded, the magistrate could only seek to protect against things "prejudicial to other men's rights" or that "break the public peace of societies," little that a magistrate could demand would "appear[] contrary to the conscience of a private person."[90]

Locke did not believe the government had the authority to advance religion. Rather, Locke concluded, religion "has no relation to the end of civil government."[91] This conclusion followed from his conclusion that no one could "invade the civil rights and worldly goods of each other, upon pretense of religion."[92] If individuals could not take the rights and goods of one another to promote religion, the government, succeeding to the rights of individuals, likewise could not. As Locke wrote, "Nobody, therefore, in fine, neither single persons, nor churches, nay, nor even commonwealths, have any just title to invade the civil rights and worldly goods of each other, upon pretense of religion."[93]

Although Locke did state that the magistrate "may certainly do what any good man to do,"[94] reading this as allowing the magistrate to use state authority to promote religion would be inconsistent with the inability of citizens and governments to make demands on others upon pretense of religion. Locke's use of "man" in *A Letter Concerning Toleration*[95] to define the magistrate's powers suggests as much, because no ordinary citizen would have the power to take another's money to support religion. Moreover, Locke uses the phrase "magistrate" to refer to officials acting in their own persons, rather than the whole government. Locke distinguished between "magistrate" and the government, suggesting that he distinguished between the magistrate's own

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88 *Id.* at 33.

89 *See id.* at 47; McConnell, *supra* note 16, at 1435.

90 LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 25, at 59.

91 *Id.* at 60.

92 *Id.* at 31.

93 *Id.*

94 *Id.* at 20.

95 LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 25.

rights and the magistrate's use of the government.[96] At any rate, Madison and Hamilton in *The Federalist Papers* and Madison in the debates used "magistrate" to denote government officials, suggesting that this was the understanding the Framers placed upon Locke's writing.[97] Jefferson also apparently adhered to this view, writing to Madison, "I know but one code of morality for men whether acting singly or collectively."[98]

To summarize Locke's view: The sole concern of government was preventing an invasion of the rights of others. Government could not prevent an individual from hurting herself—such as dissipating her wealth and health in a tavern. Because the sole concern of government was preventing an invasion of the rights of others, religion had no relation to government. A government could not impose disabilities on individuals because of their religion, because such disabilities would have no relation to preventing an invasion of the rights of others. Thus, an individual could not be discriminated against on the basis of her religion. On the other hand, an individual could not advance claims against others on the basis of her religion, either. The government likewise could not promote religion. To do so would allow it to take money from some of the citizens to promote the views of other citizens, something no citizen could do. Officials in government, however, could adhere to their own religious views

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[96] *See* LOCKE, THE SECOND TREATISE OF GOVERNMENT, *supra* note 25, at ¶ 202 (distinguishing between superior and inferior magistrates); *id.* at ¶ 89 (distinguishing between "government," "the legislative," and "magistrates appointed by it [the legislative]"). *But see* Michael W. McConnel, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 159 n. 201 (1992) (citing LOCKE, THE SECOND TREATISE OF GOVERNMENT, *supra* note 25, at ¶ 208) ("Locke's language may lead some modern readers to think he is talking of the government official's right to speak in his private capacity (for example, a president referring to God in a speech). But in context it is plain that by "magistrate" Locke meant the government—not the government official.").

[97] Hamilton described the President as a "single magistrate" and the "Chief Magistrate." THE FEDERALIST No. 69, at 415, 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Madison described the President as the executive magistrate. *See id.* No. 47 *passim* (James Madison); *see also id.* No. 46, at 297 (James Madison) (chief magistrates of state). Madison, in discussing the need for a Bill of Rights in the debates, used Lockean language in advocating "effectual provisions against the encroachments on particular rights . . . interposed between [the people] and the magistrate who exercises the sovereign power . . . ." 1 ANNALS, *supra* note 24, at 433 (statement of Rep. Madison, June 8, 1789).

[98] Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *in* 5 THE WRITINGS OF THOMAS JEFFERSON 107, 111 (Paul L. Ford ed., 1895). This sort of thought may be taken as characteristic of the Framers. *See, e.g.*, Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 5 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 115, 116 ("What is true of every member of society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of individuals.").

and act on their own to promote them, just as a private citizen could.

One reason for Locke's enormous influence on the Americans' concept of religious liberty[99] may have been because his social contract views were consistent with American doctrines going back to the Mayflower Compact. In Massachusetts, the Puritans "drew upon and developed the theory of social covenant . . . ."[100] Their imagery and language of separation were similar to Locke's. Even in 1650, well before Locke, and even in Massachusetts, the last state to abandon establishment,[101] it was "unlawful for" the Magistrates "to compel their subjects to become church-members" or for "church-officers to meddle with the sword of the Magistrate . . . ."[102] The church authorities had no power to "degrad or depose any man from any Civill dignities, office, or Authoritie he shall have in the Commonwealth."[103] The Massachusetts church leadership also recognized this. The Cambridge Synod and Platform of 1648 stated, "Church-government stands in no opposition to civil government of comon-welths, nor any intrencheth upon the authority of Civil Magistrates in their jurisdictions . . . ."[104] Thus, in 1640 Thomas Lechford wrote, "The Magistrates, and Church-leaders, labour for a just and equall correspondence in jurisdictions, not to intrench one on the other."[105]

Parallel language to Locke's view may also be found in other jurisdictions, which also distinguished between what was appropriate for the civil magistrate and what was appropriate for the church. Roger Williams, founder of Rhode Island, believed that "the *conscience* of the *Civill Magistrate* . . . bound [him] to preserve the *civill* peace and quiet of the *place* and people under him."[106] However, "[t]o batter downe *Idolatry, false worship, heresie, schisme,*

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[99] *See supra* notes 79–80.

[100] GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 19 (1960).

[101] *See* 1 STOKES, *supra* note 55, at 426–27.

[102] CAMBRIDGE SYNOD AND PLATFORM OF 1648, *reprinted in* WILLISTON WALKER, THE CREEDS AND PLATFORMS OF CONGREGATIONALISM 235–36 (1969).

[103] Liberties of the Massachusetts Colony ¶ 60 (1641); *see also* HASKINS, *supra* note 100, at 62. Conversely, although the "civill Authoritie hath power and libertie to see the peace, ordinances, and Rules of Christ observed in every church," it could do so only "in a Civill and not in an Ecclesiastical way." Liberties of the Massachusetts Colony ¶ 58 (1641). On the function of the Liberties of the Massachusetts Colony, see HASKINS, *supra* note 100, at 129–32.

[104] CAMBRIDGE SYNOD AND PLATFORM OF 1648, *reprinted in* WALKER, *supra* note 102, at 235–36.

[105] HASKINS, *supra* note 100, at 62, 246 n.110 (citing Thomas Lechford "Plain Dealing: or Newes from New-England," Mass. Hist. Soc. Coll. 3rd ser., III, 74 (1833)).

[106] Roger Williams, *The Bloody Tenet of Persecution* (1647), *in* PERRY MILLER & THOMAS H. JOHNSON, THE PURITANS 222–23 (1963) (emphasis in original).

blindnesse, hardnesse . . . [those] *spirituall strong holds* in the soules of men, *Spirituall Artillery* and *weapons* are proper . . . [and] civill *weapons* are improper . . . and never able to effect ought in the *soule*."[107]

Locke's influence may have been enhanced by the Americans' creation of judicial review, which removed one of the obstacles to the application of Lockean analysis to religious liberty: Locke's belief that a dispute between the magistrate and the citizen could, in the last analysis, be resolved only by an "appeal to heaven"—Locke's euphemism for revolution.[108] The American Constitution, by providing for judicial review, allowed the courts to be interposed between the power-seeking legislative and executive branches and the citizen.[109] Madison, in discussing the need for a Bill of Rights in the debates, used Lockean language in advocating "effectual provisions against the encroachments on particular rights . . . interposed between [the people] and the magistrate who exercises the sovereign power . . . ."[110] These limitations, Madison continued, would allow the "independent tribunals of justice" to "consider themselves in a peculiar manner the guardians of those rights."[111]

2. *The Social Contract and Religious Liberty During the Framing*

Like Locke, the Framers believed that the government could neither abridge nor confer rights on the basis of religion and that conduct that did not affect others was beyond the reach of the government. The rule that the rights of no sect could be invaded prevented the government from interfering with religion. The rule that no sect could invade another's rights prevented the government from promoting religion. Because true religion would not call on its adherents to invade the rights of others, these rules were not in conflict. Just as Locke wrote that religion "has no relation to the end of civil government,"[112] Madison could conclude in his *Memorial and Remonstrance* that "Religion [was] not within the cognizance of Civil Government."[113]

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[107] *Id.* at 223.

[108] *See* McConnell, *supra* note 16, at 1442.

[109] *See* THE FEDERALIST No. 16, at 117 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* No. 44, at 285–86 (James Madison); *id.* No. 78, at 466–69 (Alexander Hamilton).

[110] 1 ANNALS, *supra* note 24, at 433 (statement of Rep. Madison, June 8, 1789).

[111] *Id.* at 439.

[112] LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 25, at 60.

[113] Madison, Memorial and Remonstrance, *supra* note 19, at ¶ 8. Madison later wrote that "the rights of conscience are not surrendered to the state." *See also* Letter from James Madison to Rev. Adams (1832), 9 WRITINGS OF JAMES MADISON 484 (Gaillard Hunt ed., 1910), *reprinted in* 5 KURLAND & LERNER, *supra* note 59, at 107.

I quote Madison here only as an example, because of the *Memorial's* role as an authoritative guide to the meaning of the religion clauses.[114] As the following discussion shows, this view of the relation of religion and government was widely held and explains why so many of the Framers believed the guarantees of freedom of religion were implicit in the original Constitution.

a. *Prohibition of Acts that Do Not Harm Others*

Like Locke, the Framers believed that the government could not prohibit acts that did not harm others. Madison equated protection of religion, person, and property, and required a just government to prevent any sect from invading the rights of another. In his widely circulated *Memorial*, he wrote, "[A just] government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."[115] These considerations led Madison to conclude in his *Memorial* that "Religion [was] not within the cognizance of Civil Government."[116] In later years, Madison wrote of the "immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace."[117]

Jefferson's views were similar. In the *Bill for Establishing Religious Freedom*,[118] adopted in Virginia as a declaration of fundamental natural rights, Jefferson wrote "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts *against peace and good order*."[119] In Jefferson's *Notes on the State of Virginia*,[120] he wrote, "The legitimate powers of government extend to such acts only as are injurious to others."[121]

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[114] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 *passim* (1962).

[115] Madison, Memorial and Remonstrance, *supra* note 19, at ¶ 8.

[116] *Id.*

[117] Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 5 KURLAND & LERNER, *supra* note 59, at 105.

[118] Thomas Jefferson, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (June 12, 1779), *in* 5 KURLAND & LERNER, *supra* note 59, at 77 (codified as 12 VA. STAT. 84 (Hening 1823) *in* 1 STOKES, *supra* note 55, at 392).

[119] Virginia Act for Establishing Religious Freedom, 12 VA. STAT. 84 (Hening 1823) (emphasis supplied) *in* 1 STOKES, *supra* note 55, at 392.

[120] THOMAS JEFFERSON, NOTES ON THE STATE OF VIGINIA (William Peden ed., 1955).

[121] *Id.* at159.

The Framers' social contract view rejected the idea that the government could prohibit conduct that caused only psychic harm, harm caused by the knowledge that someone was behaving in a way that one believed improper.[122] In Jefferson's *Notes on the State of Virginia*, he wrote, "The legitimate powers of government extend to such acts only as are injurious to others. *But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.*"[123] Jefferson's *Notes on the State of Virginia* were sufficiently widely circulated at the time of the framing to be discussed at length in *The Federalist Papers*, which were intended for a New York audience.[124] Moreover, Jefferson used identical words on other occasions, so others may have learned Jefferson's views from other sources.[125] Similarly, Madison noted that the state would protect "Religion with the same equal hand which protects his person and his property"—suggesting that the state would not protect against hurt feelings.[126]

The social contract model's limitations on state power were expressed in many of the state constitutions adopted at about the time of the framing. Most of these constitutions expressly preclude the use of "free exercise" to disturb

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[122] Some have argued that psychic harm is indistinguishable from other forms of harm. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 257–58 (1990). Professor Bork specifically claims that there is no way to distinguish between the pain of torture and the feelings a religious bigot has from knowing that couples are using contraception, *id.*, but he does not attempt to show that his claim is consistent with the intent of the Framers, on which he elsewhere relies. Distinguishing between torture of animals from mere psychic pain is nothing novel. As Gray observed long ago, "acts of cruelty, for instance, towards beasts, may be forbidden, at least conceivably, for the sake of the beasts themselves." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 141 (2d ed. 1921). For a critique of Bork on Aristotelian grounds, see Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 730 (1994). One reason for Bork's failure is that he understands the Constitution as a positivist, but the Framers were natural law theorists. *See* HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION 56 (1994).

[123] JEFFERSON, *supra* note 120 (emphasis added). *Cf.* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 190 (strong feelings do not create the basis for entitlements); DWORKIN, *supra* note 50, at 276 (utilitarianism, to be workable, must exclude utility functions that depend on other individual's utility); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 223 n.14 (1980). *But see generally* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 69–86 (1985). However, even Calabresi concedes that imposing fundamental values on another person "becomes close to intolerable." *Id.* at 87.

[124] *See* THE FEDERALIST Nos. 48, 49 (James Madison).

[125] *See* Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808) *reprinted in* 5 KURLAND & LERNER, *supra* note 59, at 98–99.

[126] Madison, Memorial and Remonstrance, *supra* note 25, at ¶ 8.

others.[127] These clauses undermine *Employment Division v. Smith* for three reasons. First, if *Smith* had been correct in concluding that the Free Exercise Clause does not protect action from general state laws, these provisions would be superfluous, so their very existence implies that *Smith* was wrong. On the social contract view, these clauses do make sense—they guard against claims by those adhering to religious views that purported to confer rights to harm others. Second, because the Framers and ratifiers did not intend to give the limited federal government more power over religion than the states possessed,[128] their limit on state power implies a similar limit on federal power. Finally, the language of "free exercise" in the First Amendment would naturally be read by ratifiers as being in accord with the existing understanding of free exercise in the state constitutions.[129]

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[127] *See* DEL. DECLARATION OF RIGHTS §§ 2-3 (1776) ("Free Exercise" and limitation, respectively); MD. CONST. DECLARATION OF RIGHTS, § XXXIII (1776); MASS. CONST., pt. I—DECLARATION OF RIGHTS, art. II (1780); N.H. CONST. art. V (1780); N.Y. CONST. art. XXXVIII (1777) ("free exercise" and limitations); N.C. CONST. (1778); N.C. CONST. art. VIII, § 1 (1790); R.I. CHARTER (1663); S.C. CONST. art. VIII, § 1 ("free exercise" and limitations). Two other constitutions had earlier expressly limited free exercise rights in the fashion of the other states, but later dropped the restriction. *Compare* GA. CONST. art. LVI (1776) (conferring "free exercise" rights "provided it be not repugnant to the peace and safety of the State") *with* GA. CONST. art. 10, § 5 (1789) (using otherwise identical language, but omitting the "peace and safety" clause); *compare* MD. CONST. (1776) (providing free exercise rights "unless, under colour of religion, any man should disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights") *with* MD. CONST. (1780) (rewriting the constitutional guarantees and omitting the "peace and safety" clause).

[128] *See supra* notes 38-39 and accompanying text.

[129] Professor Hamburger has argued that these clauses should be interpreted as having the same meaning as the phrase "contra pacem," which defined the criminal offenses over which the English King's or Queen's Bench had jurisdiction, and which would be satisfied in any criminal case. *See* Hamburger, *supra* note 16, at 918 (citing Queen v. Lane, 6 Mod. 128, 87 Eng. Rep. 884 (Q.B. 1704)). From this, he concludes that the Framers did not intend a right of religious exemption, and he specifically criticizes McConnell. *See id.* 16at 916 & n.3 (citing McConnell, *supra* note 16 (the Free Exercise Clause requires exemptions), and McConnell, *supra* note 42 (same)).

There are several objections to Professor Hamburger's argument. First, Professor Hamburger's reading of the clauses, to mean that they had no application in any criminal case, renders them almost meaningless as a restraint on governmental power.

Second, the phrase "contra pacem" was used in England to invoke the jurisdiction of the King's or Queen's Bench, and avoid the local feudal courts. *See, e.g.*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 9, 13 (2d ed. 1979). The colonies did not have local, feudal courts, so this use of the phrase would have been unfamiliar to colonials.

Third, Blackstone's *Commentaries* use "breach of the peace" in an entirely different

The Framers found the language of "free exercise" fully protective of religion because they believed that religion, properly defined, was consistent with social duties. Jefferson's famous letter to the Danbury Baptist Association stated that a person "'has no natural right in opposition to his social duties.'"[130] Because of this, Jefferson continued, it was possible for the Bill of Rights to build "a wall of separation between church and State."[131] In this, the Framers again followed Locke, who had concluded that because the magistrate could only seek to protect against things "prejudicial to other men's rights" or that "break the public peace of societies," little that a magistrate could demand would "appear[] contrary to the conscience of a private person."[132]

b. *Governmental Promotion of Religion*

The second implication of the view that government could neither interfere with the private exercise of religion nor give benefits on the grounds of religion was that the government could not promote religion.[133] For the Framers, the

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and narrower sense. 4 BLACKSTONE'S COMMENTARIES *142–60. Blackstone is a better guide to the colonists' intent, because it was both far more widely circulated and more relied upon in American than the five-line 1702 Queen's Bench decision in *Queen v. Lane* on which Professor Hamburger relies for his definition. Some 2500 copies of Blackstone's *Commentaries* had been sold in America prior to 1776. EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 53 (1948). Blackstone was among the legal sources read and cited by the colonists, *see, e.g.*, WOOD, *supra* note 80, at 7, 14, including John Adams, Nathaniel Green, James Madison, Alexander Hamilton, John Jay, and Patrick Henry, *see* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 743–45 (1976). Blackstone's *Commentaries* was read as precedent for the point under discussion in *The Federalist Papers*. *See* THE FEDERALIST No. 69, *supra* note 97, at 418 n.*, 419 n.* (Alexander Hamilton); *id.* No. 84 (Alexander Hamilton). Blackstone's *Commentaries* also served as precedent for the point at issue in a debate on the floor of the Pennsylvania Ratifying Convention. *See* 1 JOHN B. MCMASTER & FREDERICK D. STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, 360–61 (1888).

[130] Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *reprinted in* 8 WRITINGS OF THOMAS JEFFERSON 113 (Henry A. Washington ed., 1861), *quoted in* Reynolds v. United States, 98 U.S. 145, 164 (1878).

[131] *Id.*

[132] LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 25, at 59.

[133] Some have argued that the right not to be burdened on the basis of religion can be derived from the right against governmental promotion of religion, so that prohibiting governmental promotion provides full protection for religion. *See* Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First*

chief reason for objecting to the government promotion of religion was the interference it caused to individuals' rights. James Madison, the First Amendment's author, wrote in defense of religious liberty in his *Memorial and Remonstrance*: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[134] Thomas Jefferson's *Virginia Bill for Religious Freedom* agreed that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[135]

Madison's *Memorial and Remonstrance Against Religious Assessments*[136] is especially important in determining how the Framers and ratifiers understood the Establishment Clause, because it uses the phrase "establishment" to describe a Virginia statute that would have compelled property holders to contribute three pence to the church of the contributor's choice.[137] Madison's description of compelled support of one's own church as an establishment in the widely circulated *Memorial* suggests that the Framers and ratifiers would have understood the Establishment Clause as prohibiting such support. The title of the bill itself, which describes it as the "Establishing" provision for teachers of the Christian religion, is also suggestive on this point.[138] If the compulsory support of one's own religion was a prohibited establishment—although there would be no penalty for belonging to a particular religious group, no adverse persuasive effect, and no differential treatment of the members of the religions—compulsory support of another's religion would certainly be prohibited.

The harm caused by government's promotion of religion comprised not only the deprivation of a person's property in order to support another's

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Amendment, 45 U. CHI. L. REV. 805 (1978). However, this view fails to provide full protection. If the rewards attached to one set of beliefs encourage the profession of that belief, making disassociation between the effects on believers and beliefs impossible, the legislature can corrupt the marketplace of religious ideas indirectly by making some religious beliefs more attractive to hold than others. On the other hand, if rewards or punishments do not alter people's religious beliefs, the theory, which is based on the need to avoid governmental promotion of religion, would provide no grounds to object to the distribution of penalties or benefits on the basis of religion.

[134] Madison, Memorial and Remonstrance, *supra* note 25, at 186.

[135] Virginia Act for Establishing Religious Freedom, Preamble, 12 VA. STAT. 84 (Hening 1823), *in* 1 STOKES, *supra* note 55, at 392. Here again, the Framers were following Locke.

[136] For the *Memorial's* role as an authoritative guide to the meaning of the religion clauses, see Engel v. Vitale, 370 U.S. 421 *passim* (1962).

[137] *See* Madison, Memorial and Remonstrance, *supra* note 25, at ¶¶ 3, 6, 7, 8, 9.

[138] *See id.*

religion, but also the disadvantage that it caused those of competing views. Madison objected to a statute exempting Quakers and Mennonites in part because this exemption would enable them to attract adherents. Madison asked, "Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others?"[139]

The Framers also objected to the governmental promotion of religion because it could contribute to future tyrannies. Madison wrote in *The Federalist Papers*, "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects."[140] Thus, Madison continued, "The degree of security in both cases will depend on the number of interests and sects . . . ."[141] Such views were a common part of political discourse at the time.[142]

Although some might fear that this view would deprive religion of necessary support, that was not the view of the Framers. Madison and other religious individuals in early America believed that religion benefited by freedom from government money. As Madison wrote in his *Memorial and Remonstrance*, "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."[143] Many shared this view.[144] Some also feared the support a state-

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[139] *Id.* at ¶ 4.

[140] Larson v. Valente, 456 U.S. 228, 245 (1982) (quoting THE FEDERALIST No. 51, *supra* note 24, at 324 (James Madison)).

[141] THE FEDERALIST No. 51, *supra* note 24, at 324 (James Madison); *see also* THE FEDERALIST No. 10 (James Madison); 11 PAPERS OF JAMES MADISON 130–31 (William T. Hutcheson ed., 1977) (making similar multiplicity of sects argument).

A proponent of wealth- or utility-maximization might favor the availability of a variety of religious views, because it increased the possibilities of consuming religion and the satisfaction that consumers of religion derived from them. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 678–79 (3d ed. 1992). Neither Locke nor the Framers adhered to this view, because they regarded religion as a matter of truth. *See, e.g.*, LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 25, at 60; Virginia Act for Establishing Religious Freedom, 12 VA. STAT. 84 (Hening 1823), *in* 1 STOKES, *supra* note 55, at 392. There is no evidence that they would have regarded individuals as benefitting from their adherence to a false religion, even if it made them feel better.

[142] *See* ADAM SMITH, THE WEALTH OF NATIONS, Bk. 5, ch. 1, pt. 3, art. 3 (1776).

[143] Madison, Memorial and Remonstrance, *supra* note 25, at ¶ 7.

[144] *See* 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194 (1836) (statement of James Iredell, subsequently a Supreme Court Justice); Roger Williams, *The Bloody Tenet of Persecution* (1647), *in* 1 PERRY MILLER & THOMAS JOHNSON, THE PURITANS 222–23 (1963). *See generally* McConnell, *supra* note 16, at 1442–43.

aided church could lend to monarchy.[145] Consequently, most of the Framers believed that keeping the government from supporting religion benefited religion. This view was shared by later observers. Alexis de Tocqueville reported in *Democracy in America*[146] that all clergymen

> agreed with each other except about details; all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that.[147]

This rejection of the possibility that the federal government could treat religion specially is consistent with the Framers' rejection of other attempts to allow the federal government to promote morality. Morris proposed allowing Congress to "promote useful learning and inculcate sound morality"; the proposal was defeated.[148] Mason proposed allowing Congress to adopt sumptuary laws,[149] the proposal was rejected.[150] In a subsequent attempt to introduce the subject, it was sent to a committee[151] and rejected again when it was reported out.[152] A proposal to allow Congress to create a university was also rejected.[153] The Framers of the Constitution believed, as Madison stated in

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[145] "[T]he revolutionaries had identified the dominant pre-war church with the monarchy." WOOD, *supra* note 21, at 17–18.

[146] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer, ed. & George Lawrence trans., 1969) (translating the thirteenth edition of the original, published in 1850, the last version in Tocqueville's life).

[147] *Id.* 295. At that time, law and public opinion entirely excluded the clergy from a career in politics. *See id.* at 496; *see also, e.g., id.* at 445, 545–46 ("state religions . . . are always sooner or later fatal for the church").

[148] *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1984) (Aug. 20, 1787), *reprinted in* THE MAKING OF THE AMERICAN REPUBLIC: THE GREAT DOCUMENTS 1774–1789 109, 573 (Charles Callan Tansill ed., 1927). The preamble's declaration that one of the goals of the Constitution was to "promote the general Welfare" did not expand the powers of the federal government so as to alter this result. Although "[t]he importance of examining the preamble . . . [is] universally conceded," STORY, *supra* note 51 § 459, at 326, the preamble cannot enlarge the powers. *See id.* § 462, at 327–28. Moreover, in discussing the general welfare, Story refers to roads, bridges, and the like, not improvement of morals. *See id.* §§ 497–507.

[149] *See* MADISON, NOTES OF DEBATES, *reprinted in* MAKING OF THE AMERICAN REPUBLIC, *supra* note 148, at 109, 574.

[150] *See id.*

[151] *See id.* at 714.

[152] *See* PAPERS OF DR. JAMES MCHENRY ON THE FEDERAL CONVENTION OF 1787, *reprinted in* MAKING OF THE AMERICAN REPUBLIC, *supra* note 148, at 940.

[153] *See* MADISON, NOTES OF DEBATES, *reprinted in* MAKING OF THE AMERICAN

the federal convention, that "[t]he primary objects of civil society are the security of property and public safety."[154] In the words of the Constitution and an early post framing commentator, establishing religion or prohibiting its free exercise did not "promote the general welfare."[155]

The state constitutions prevailing at the adoption of the Bill of Rights support the same social-contract-based restrictions. Most of the state constitutions drafted at about the time of the framing[156] expressly prohibited any compulsory support.[157] All of the rest, except New York, prohibited compelling a citizen to support a religion other than the one the citizen professed.[158] New York's constitution guaranteed free exercise and nondiscrimination among religions, prohibiting support for another's sect, but not expressly resolving the issue of compulsory support for one's own sect.[159]

c. *Implicit Rights*

The social contract view of the Framers explains the Framers' belief that the original Constitution implicitly guaranteed freedom of religion.[160] They

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REPUBLIC, *supra* note 148, at 725.

[154] *Notes of Major William Pierce G.A. in the Federal Convention of 1787, in* 3 AM. HIST. REV. 317-34 (1898) (statement of Mr. Madison June 6, 1787), *reprinted in* MAKING OF THE AMERICAN REPUBLIC, *supra* note 148, at 87, 95.

[155] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 121 (2d ed. 1829), *reprinted in* 5 KURLAND & LERNER, *supra* note 59, at 106.

[156] Rhode Island and Connecticut did not alter their colonial charters until substantially after the Revolution and the drafting of the Constitution.

[157] Eight states prohibited support entirely. *See* DEL. DECLARATION OF RIGHTS § 2 (1776); GA. CONST. art. LVI (1776); GA. CONST. art. 10, § 5 (1789); N.J. CONST. art. XVIII (1776); N.C. CONST. art. XXXIV (1776); PA. CONST. DECLARATION OF RIGHTS ¶ II (1776); S.C. CONST. art. VIII (1790); VT. CONST. ch. 1, art. III (1786).

[158] The three states that expressly permitted compulsory support required support only for one's own sect. *See* MD. CONST., DECLARATION OF RIGHTS, art. XXXIII (1776); MASS. CONST. Pt. 1 (Declaration of Rights), art. III, para. 4 (1780); N.H. CONST. art. VI (1784).

[159] New York's constitution does not expressly resolve the issue: "[T]he right of free exercise and enjoyment of religious profession and worship, without discrimination or prejudice shall forever after be allowed within this State, to all mankind." N.Y. CONST. art. XXXVIII (1777). Subsequent court interpretations suggest that any coercion at all was prohibited. People v. Ruggles, 8 Johns. 290 (N.Y. 1811).

[160] *See* 1 ANNALS, *supra* note 24, at 438 (statement of Rep. Madison, June 8, 1789) ("[I]n the Federal Government [a declaration of rights is] unnecessary, because the powers are enumerated . . . and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government."). Numerous other examples of the same principle occur. The following are taken from debates over what became the First

understood the powers of government to be limited to the prevention of harm to others and believed that religion could not cause others harm. Because the theory of an implicit guarantee of rights depended on the social contract view, the widespread adherence to the implicit rights view strongly suggests that the social contract interpretation of the religion clauses is correct.[161]

This view of rights as implicit was not limited to the Constitutional Convention. The first two state ratifications of the Constitution that suggested amendments to safeguard rights proposed nothing about freedom of religion, speech, or press.[162] Instead, they dealt solely with positive rights—taxation, exclusivity of merchant companies, the rate of interest paid by the states on debts to the federal government, trial by jury, and the like.[163] Because it is difficult to believe that the ratifiers in these states thought all these provisions were more important than the freedom of religion, speech, and press, the

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Amendment. *See id.* at 442 (statement of Rep. Jackson, June 8, 1789) ("There is no power given to Congress to regulate this subject [the liberty of the press] as they can commerce, or peace, or war."); *id.* at 730 (statement of Rep. Sherman, Aug. 15, 1789) ("[T]he amendment [was] altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments."); *id.* at 732 (statement of Rep. Hartley, Aug. 15, 1789); *see also* THE FEDERALIST No. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"); THE FEDERALIST No. 69, *supra* note 97, at 422 (Alexander Hamilton) (stating that the President "has no particle of spiritual jurisdiction.").

[161] Religious rights were natural, "pre-existent rights of nature, . . . retained when particular powers are given up to be exercised by the Legislature." 1 ANNALS, *supra* note 24, at 437 (statement of Rep. Madison, June 8, 1789). *See also* Jefferson's Virginia Act for Establishing Religious Freedom, 12 VA. STAT. 84 (Hening 1823); Madison, Memorial and Remonstrance, *supra* note 25, at ¶ 4 (quoting VA. CONST. Declaration of Rights, art. 1).

[162] *See* Massachusetts Ratification (Feb. 6, 1778), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 93–96 (1894); South Carolina Ratification (May 23, 1778), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 138–40 (1894).

[163] Positive rights, like the right to "[t]rial by jury[,] cannot be considered as a natural right, but a right resulting from a social compact." 1 ANNALS, *supra* note 24, at 437 (statement of Rep. Madison, June 8, 1789). Religious rights were natural, "pre-existent rights of nature," "retained when particular powers are given up to be exercised by the Legislature." *Id.* In their differentiation between natural and positive rights, the Framers again followed Locke. Part of the power given up in the transition from the state of nature, according to Locke, is "the power to punish crimes." LOCKE, THE SECOND TREATISE OF GOVERNMENT, *supra* note 25, at ¶ 128. The citizen instead acquires the duty of assisting "the executive power of the society, as the law thereof shall require." *Id.* at ¶ 130. Thus, procedural rights relating to the enforcement of the laws are positive, not natural.

ratifications suggest strongly that many of the ratifiers believed that the original Constitution sufficiently safeguarded these freedoms.[164] That, in turn, suggests that many of the ratifiers adhered to the social contract view's provision of implicit rights.

One might argue that the social contract view's prohibition of the compulsory transfers of money to support religion extended only to direct transfers from one person to another, and not to the government's use of money compelled from individuals. However, this view runs against the frequently repeated idea that governments were to have no more power than individuals. As Jefferson wrote to Madison, "I know but one code of morality for men whether acting singly or collectively."[165]

Moreover, the Framers expressly rejected this limitation in hiring and conscription, confirming that the government's conduct could not escape scrutiny by acting indirectly. With respect to the government's power to influence people through patronage, the Religious Test Clause in the original Constitution avoided this possible limitation of the structural guarantees.[166]

With respect to conscription, the Framers rejected a constitutional right of exemption. Although the Framers recognized that the government needed money and people to carry out its functions as part of the *quid pro quo* whereby one obtained a government to defend one's rights,[167] these demands

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[164] Of course, the provision of express constitutional guarantees need not imply rejection of implicit rights. As Patrick Henry observed in the Virginia Ratification Convention, express guarantees avoided compelling people to rely on syllogisms for their rights. *See* 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 316–18 (1834) (statement of June 12, 1788), *in* 5 KURLAND & LERNER, *supra* note 59, at 103.

[165] Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *reprinted in* 5 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 98, at 111. This sort of thought may be taken as characteristic of the Framers. *See, e.g.*, Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* 5 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 98, at 116 ("What is true of every member of society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of individuals.").

[166] U.S. CONST. art. VI, cl. 3 ("[N]o religious test shall ever be required as a qualification to any office or public trust under the United States.").

[167] "Nothing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers." THE FEDERALIST No. 2, *supra* note 26, at 37 (John Jay). *See also* THE FEDERALIST No. 34, at 210 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he exigencies of the Union [for taxation] could be susceptible of no limits, even in imagination."); THE FEDERALIST No. 23, at 154 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting that one of the main purposes

could also differentially burden those who had conscientious objections to warfare. In the debates over what became the Second Amendment, the draft originally included a provision that "no person religiously scrupulous shall be compelled to bear arms."[168] The principal objection was to the provision of an exemption.[169] Representative Jackson believed that it would be "unjust" for "one part" of the United States "to defend the other in case of invasion."[170] He proposed that anyone personally refusing be required to pay an equivalent.[171] Others agreed.[172] Representative Benson opposed the exemption, arguing that no one could "claim this indulgence of right" because it "is no natural right, and therefore ought to be left to the discretion of the Government."[173] Others observed that many would be as conscientiously scrupulous about procuring a substitute as they would be about serving themselves.[174] A motion to strike out the provision for conscientious objection apparently failed, 22 to 24.[175] Although the close vote indicates that the provision was controversial from the start, because most of the representatives did not speak during the debates, we do not know for certain why the clause was ultimately dropped. However, the contrast between this and the other debates over religion—which concerned details of phrasing to achieve an agreed-upon result—suggests that many adhered to Representative Benson's view that exemption from military service was not a natural right, perhaps because, as Representative Jackson observed, it would impose unequal burdens depending on one's religious views.[176]

The distinction that the representatives evidently made between the protection provided against government conduct that did not harm others and the absence of protection from government demands for services further supports the conclusion that the Framers believed that there was a structural guarantee of religious freedom in the initial Constitution. In their view, this guarantee did not provide exemptions as a natural right, but it did provide as a

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of the new federal Constitution was to enable the easier levying of troops).

168 1 ANNALS. *supra* note 24, at 749.

169 Various objections were made to the phrasing and to the propriety of requiring, or not, the procurement of a substitute. *See id.* at 749–51.

170 *Id.* at 750 (statement of Rep. Jackson, Aug. 17, 1789).

171 *See id.*

172 *See id.* (statement of Rep. Smith, Aug. 17, 1789).

173 *Id.* at 751 (statement of Rep. Benson, Aug. 17, 1789).

174 *See id.* at 750 (statement of Rep. Sherman, Aug. 17, 1789); *id.* at 751 (statement of Rep. Vining, Aug. 17, 1789). Representative Sherman, although noting this possibility, "did not see an absolute necessity for a clause of this kind." *Id.* at 750.

175 *See id.* at 751.

176 *See id.* at 750.

natural right immunity from the governmental prohibition of conduct that did not affect others.

d. *Summary*

To summarize, then, those drafting and approving the religion clauses wanted to prevent governmental incursions on the basis of religion. This meant that the government could not interfere with individuals in the private sphere of their religion unless their religion affected others. It also meant that individuals could not use the religion clauses to justify invading the rights of others. With respect to religion, the government was to leave the citizens in the pre-government position except as their conduct affected others.

The religion clauses embody this understanding and therefore restrain the government from doing things that its powers would otherwise permit it to do, but do not allow it to exercise governmental power to alter the preexisting situation with respect to religion. Moreover, the concept of harm to others does not include psychic damage caused by blasphemy or conduct otherwise in disregard of the rules of others' religions. Consequently, the power of the government to prevent harm to others did not eliminate the rule that government could not regulate merely self-regarding acts. This view of the religion clauses avoids the conflict between the clauses. The Supreme Court's early decisions carried these views into effect.

3. *The Social Contract View and the Early Supreme Court Decisions*

The widespread nature of the social contract view is further evidenced by early judicial opinions, which seem to have held that the fundamental principles of government prohibited the legislature from shifting property from one person to another. In *Calder v. Bull*,[177] Justice Chase suggested that a state legislature could not, even if "not expressly restrained by the Constitution"[178] adopt a law that "takes property from A. and gives it to B.,"[179] because such a law would exceed the proper power of government. Justice Story's opinion for the Court in *Terrett v. Taylor*[180] struck down Virginia's attempt to divest the Episcopal Church of its property because it would violate the "fundamental laws of every free government."[181]

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[177] 3 U.S. (3 Dall.) 386 (1798).
[178] *Id.* at 388.
[179] *Id.*
[180] 13 U.S. (9 Cranch) 43 (1815).
[181] *Id.* at 52.

Early Court decisions saw these limitations as applying to both the creation of rights and their infringement. "[The federal government] can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction."[182] Later opinions also hold that the Constitution "does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."[183]

These holdings support the social contract view, and they particularly support the conclusion that the government could not promote religion or transfer burdens on the basis of religion; if any transfer was prohibited, certainly those based on individuals' exercise of their inalienable rights were prohibited. The early Court decisions also specifically apply the social contract view to the issues of the invasion of individual rights and governmental support for religion.

a. *The Invasion of Individual Rights by Governmental Regulation*

The early Supreme Court decisions adopted the Framers' statements that tested the permissibility of regulation by the difference between self- and other-regarding conduct, not the difference between belief and action. Thus, in its 1878 decision in *Reynolds v. United States*,[184] the Court followed Jefferson's statement,

> 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts *against peace and good order*.' In these two sentences is found the true distinction between what properly belongs to the Church and what to the State.[185]

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[182] United States v. Cruikshank, 92 U.S. 542, 550 (1875).

[183] Munn v. Illinois, 94 U.S. 113, 124–25 (1876) (citing Thorpe v. Rutland & B. R.R., 27 Vt. 140, 143 (1855)).

[184] 98 U.S. 145 (1878).

[185] *Id.* at 163 (citing the Virginia Act for Establishing Religious Freedom, 12 VA. STAT. 84 (Hening 1823)) (emphasis supplied). The Court then quoted Jefferson's famous letter to the Danbury Baptist Association, in which he stated that the Bill of Rights built "a wall of separation between Church and State" and that a person "'has no natural right in opposition to his social duties[.]'" The Court continued, "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured." *Id.* at 164 (quoting 8 WRITINGS OF THOMAS JEFFERSON 113 (Henry A. Washington ed., 1861)).

Had the Court intended to adopt Justice Scalia's distinction between belief and action,[186] the italicized portion would have been superfluous. Further supporting this reading of the *Reynolds* decision is that the Court was at pains to show that apparently self-regarding conduct—decisions about marriage—had social consequences.[187]

Other early decisions note that the religious clauses protected "practical freedom for all forms of religious belief *and* practice,"[188] not merely belief.[189] More recently, the Supreme Court observed that it has approved of regulation infringing on religious interests when the conduct "invariably posed some substantial threat to public safety, peace or order."[190]

The pre-*Smith* decisions also reflect the social contract view's rejection of the claim that psychic harm could justify government regulation. "[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them . . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine . . . ."[191]

Collective groups, too, could assert a right of autonomy. Thus, Justice Story wrote in his *Commentaries* that religious groups were permissible so long as they had no effect outside the groups,[192] and the Supreme Court recognized the rights of citizens to form religious organizations with internal rules not to be reviewed by the courts.[193] The idea that regulation could be based on

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[186] *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[187] *Reynolds*, 98 U.S. at 164. The case is sometimes cited for the proposition that the government could not legislate in matters of belief, but had a free hand to deal with conduct. Actually, the Court concluded that "Congress . . . was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* This is inconsistent with the *Smith* decision that religious practice was unprotected.

[188] Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) (emphasis added). *See also* McDaniel v. Paty, 435 U.S. 618, 627–29 (1978) (plurality opinion of Burger, C.J., joined by Powell, Rehnquist, and Stevens, JJ.; Marshall, J., not sitting) (holding that regulation of religion "in terms of conduct and activity rather than in terms of belief" was nonetheless subject to "judicial scrutiny" and striking down the state prohibition under the Free Exercise Clause).

[189] *Smith* misinterpreted these decisions to say that they adopted a distinction between belief and practice by quoting portions of the opinions out of context. *See Smith*, 494 U.S. at 879.

[190] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[191] Joseph Burtsyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).

[192] JOSEPH STORY, *Rules of Interpretation of the Constitution*, *in* 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 454, at 440 (1858).

[193] *See Watson*, 80 U.S. (13 Wall.) at 728–29. *Cf.* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 48–49 (1815) (giving sects the right to have corporate form does not violate the Establishment or Free Exercise Clauses); TRIBE, *supra* note 16, § 14-1 (describing religious

conduct that did not affect others is difficult to reconcile with this prohibition on the regulation of autonomous religious groups.

Finally, the decisions reject constitutional requests for exemptions from conscription.[194] The risk of conscription was part of the social contract.

b. *Governmental Promotion of Religion*

The Court has accepted the idea that government compulsion to obtain money for the propagation of opinions with which one disagrees may violate the First Amendment's guarantee of freedom of speech. In *Abood v. Detroit Board of Education*,[195] the Court applied the Free Speech Clause to prohibit a union of government employees from using non-member's service fees for subsidizing ideological activity to which the non-members objected.[196] In *Keller v. State Bar*,[197] the Court extended the principle to the state bar.[198]

In both cases, the Court relied on the objections of the Framers to compulsory religious contributions.[199] In both *Abood* and *Keller* the Court cited Madison's *Memorial* and Jefferson's *Virginia Bill* for the proposition that compulsory support "for the propagation of opinions which he disbelieves, is sinful and tyrannical."[200] *Abood* further quoted:

> James Madison, the First Amendment's author, [who] wrote in defense of religious liberty: 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?'[201]

Abood also relies on the Court's prior religion clause cases.[202]

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rights as rights of "autonomy").

[194] Gillette v. United States, 401 U.S. 437, 462 (1971); Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (dictum).

[195] 431 U.S. 209 (1977).

[196] *Id.* at 234 n.31.

[197] 496 U.S. 1 (1990).

[198] *Id.* at 10.

[199] *See supra* p. 26 and notes 134–35.

[200] *Abood*, 431 U.S. at 234 n.31; *Keller*, 496 U.S. at 10 (quoting IRVING BRANT, JAMES MADISON: THE NATIONALIST 354 (1948) (quoting Virginia Act for Establishing Religious Freedom, Preamble, 12 VA. STAT. 84 (Hening 1823), *reprinted in* 1 STOKES, *supra* note 55, at 392)).

[201] *Abood*, 431 U.S. at 234 & n.31 (quoting 2 JAMES MADISON, THE WRITINGS OF JAMES MADISON, *supra* note 19, at 186).

[202] *See id.* at 235 (citing Torcaso v. Watkins, 367 U.S. 488 (1961) and Cantwell v.

Keller's and *Abood*'s reliance on freedom of religion in a free speech case means that the Court cannot logically reject the statements of Jefferson and Madison in the area of religion, where they were intended to apply. The Constitution's express prohibition of a religious "establishment" of an official viewpoint provides much more justification for prohibiting government religious speech than for prohibiting non religious speech. *Abood*'s extension of this prohibition to the non religious speech of private organizations that use their positions as bargainers with the government to raise money for private speech further supports the view that the government's use of money for religious speech violates the rights of those compelled to contribute the money.[203]

It is true that Justice Rehnquist, who wrote the Court's *Keller* opinion, which relied on Madison's *Memorial* and Jefferson's *Virginia Bill*, has been inconsistent on this point, arguing in dissent in *Wallace v. Jaffree* that Madison's *Memorial* and Jefferson's *Virginia Bill* were irrelevant in

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Connecticut, 310 U.S. 296 (1940)).

Relying on cases like *Abood* does not presuppose that all governmental speech is prohibited, merely that religious speech must be at least as prohibited as governmental political speech, because the First Amendment provides a textual guarantee of religious nonestablishment. *See* Michael McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405, 448–49. Numerous cases have prohibited government agencies from spending money to influence citizens on political issues, sometimes holding that structural considerations prohibit such expenditures independently of guarantees of freedom of speech. *See, e.g.*, Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1985) ("The principles of representative government enshrined in our constitutions would limit government intervention on behalf of its own candidates or against their opponents even if the First Amendment and its state equivalents had never been adopted."). *See also* Stanson v. Mott, 551 P.2d 1, 9 (Cal. 1976); Smith v. Dorsey, 599 So. 2d 529, 549 (Miss. 1992); Citizens to Protect Public Funds v. Board of Educ., 98 A.2d 673, 677 (N.J. 1953) (Brennan, J.); Stern v. Kramarsky, 84 Misc. 2d 447 (N.Y. 1975); Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980). *Cf.* Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (because governmental support for religion could create a dominant religious view, threatening future religious intolerance, governmental promotion of religion is worse than governmental promotion of non religious ideas).

[203] The Court had earlier held that governmental agreements creating rights to money in private persons did not make the use of that money for religious purposes a violation of the Establishment Clause. *See* Quick Bear v. Leupp, 210 U.S. 50, 81–82 (1908) (permitting the United States to appropriate Sioux funds that the United States held in trust for educational purposes, even though the fund was created by annual appropriations and would be used at a sectarian school).

interpreting the religion clauses.[204] However, leaving aside his inconsistency, his *Wallace* dissent is not well-reasoned.

In *Wallace*, he first claimed that Madison's rejection of the Bill of Rights during the Virginia ratification debates showed that Madison did not want the Virginia Bill's protections to be in the Constitution, making the *Memorial and Remonstrance* and the *Virginia Bill for Establishing Religious Freedom* irrelevant to the interpretation of the religion clauses.[205] However, Madison's work for religious freedom in Virginia shows that he believed states should be prevented from interfering with religious freedom. As Madison observed in the debates, the federal government should be bound by the same restrictions that existed for the state governments.[206] Moreover, Madison's statements that the Bill of Rights was unnecessary resulted from Madison's belief that the federal government could not violate individual liberties because this was not among its enumerated powers[207] and his belief that the absence of a Bill of Rights could best be corrected by amending the Constitution, not by refusing to ratify it.[208]

Justice Rehnquist also claimed in his *Wallace* dissent that Madison's failure to express his views in the debates makes his views irrelevant.[209] However, Madison's public writings show what Madison and the public in Virginia, and therefore the ratifiers, understood as an "establishment."[210] This information

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[204] Wallace v. Jaffree, 472 U.S. 38, 98–99 (1985) (Rehnquist, J., dissenting).

[205] *See id.*

[206] *See supra* pp. 6–7 and notes 39–40.

[207] *See* 1 ANNALS, *supra* note 24, at 438 (statement of Rep. Madison, June 8, 1789) ("[i]n the Federal Government [a declaration of rights is] unnecessary, because the powers are enumerated . . . and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the government"). *See also* THE FEDERALIST No. 69, *supra* note 97, at 422 (Alexander Hamilton) (the President "has no particle of spiritual jurisdiction"); 1 ANNALS, *supra* note 24, at 442 (statement of Rep. Jackson, June 8, 1789) ("There is no power given to Congress to regulate this subject [the liberty of the press] as they can commerce, or peace, or war."); *id.* at 730 (statement of Rep. Sherman, Aug. 15, 1789) ("The amendment [was] altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments."). *Cf.* The Sinking Fund Cases, 99 U.S. 700, 764 (1878) (Field, J., dissenting) ("The amendments prohibiting the exercise of any such power [a law respecting an establishment of religion or prohibiting the free exercise thereof] were adopted in the language of the preamble accompanying them, when presented to the States, 'in order to prevent misconception or abuse' of the powers of the Constitution.").

[208] *See* 1 ANNALS, *supra* note 24, at 436 (statement of Rep. Madison, June 8, 1789); THE FEDERALIST No. 1, at 35–36 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[209] *Wallace*, 472 U.S. at 98–99.

[210] *See* Maxwell v. Dow, 176 U.S. 581, 601–02 (1900) (citing the role of the ratifiers

about how the public understood the meaning of words assists in interpreting the amendments.

Although the Court has not expressly accepted the reasoning of *Abood* in the religious cases, it apparently accepts the conclusion that governmental support for religion can interfere with rights to communicate religious values. Only such a conclusion explains why Amish parents, who believed that high school would endanger their own and their children's salvation, had a right to relief from a statute requiring parents to send their children to high school.[211] The Court agreed with the Amish that "the modern high school is not equipped . . . to impart the values promoted by Amish society"[212] and that the state gave inadequate weight to "the values of parental direction of the religious upbringing and education of their children."[213] This right to "impart values" belongs to the parents, not the children: "[O]ur holding today in no degree depends on the assertion of the religious interest of the child . . . ."[214]

The religious interest in preventing governmental support for competing religious views also explains the Supreme Court's cases that have relied on proselytization, not on financial support or coercion, to conclude that religious rights have been infringed. In *Marsh v. Chambers*,[215] which permitted opening the legislative day with prayer, the Court was careful to note that "there is no indication that the prayer opportunity has been exploited to proselytize."[216] *Stone v. Graham*[217] prohibited posting the Ten Commandments in a school

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in interpreting constitutional amendments).

[211] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). *Cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating a law criminalizing private schools). Where the harm to the children is more serious, the courts more often allow the state to intervene. *See* Janet Anderson, *Capital Punishment of Kids: When Courts Permit Parents to Act on Their Religious Beliefs at the Expense of Their Children's Lives*, 46 VAND. L. REV. 755 (1993); Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U.P.S. L. REV. 599 (1993); Laura M. Plastine, Comment, *"In God We Trust": When Parents Refuse Medical Treatment for Their Children Based upon Their Sincere Religious Beliefs*, 3 SETON HALL CONST. L.J. 123 (1993).

[212] *Yoder*, 406 U.S. at 212.

[213] *Id.* at 213–14.

[214] *Id.* at 230. The Court explicitly rejected the idea that similar protection could be based on non religious grounds. *See id.* at 216. *Smith* claimed that these cases could be distinguished because they involved both speech and religion. Employment Div. v. Smith, 494 U.S. 872, 881 n.1 (1990) (characterizing *Yoder* as involving other constitutional protections in addition to free exercise). Justice O'Connor's opinion sharply criticized this statement. *See id.* at 895–96 (O'Connor, J., concurring).

[215] 463 U.S. 783 (1983).

[216] *Id.* at 794.

[217] 449 U.S. 39 (1980).

room, even though private money paid for the posters and no student need look at them.[218] Because the school did not use state money or coerce the students' choice among religions, the objection must be that the governmental support for one of a number of competing views about religion disadvantages those with alternative beliefs. For like reasons, commentators speak of the "prestige"—not the financial support or the interference with religious practice—resulting from voluntary Bible readings in the public schools.[219]

The principle that the government may not provide financial support to religion is illustrated by the school aid cases. The early cases, like *Everson v. Board of Education*,[220] construed the Establishment Clause as meaning, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called . . . ."[221] The Court has reasoned, "If Parliament had lacked the authority to tax unrepresented colonists, then by the same token the newly independent States should be powerless to tax their citizens for the support of a denomination to which they did not belong."[222] Nor does "laundering" money by passing it through government eliminate a claim that taking the money violates religious freedom. "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'"[223]

The Establishment Clause not only prohibits the government from providing direct support for religion, it also prohibits using religion as a ground for shifting benefits or burdens among citizens. *Estate of Thornton v. Caldor, Inc.*[224] invalidated a law giving employees the right not to work on their Sabbath, because honoring the Sabbatarian's right would shift a "significant" burden to employees with other religious beliefs.[225] "Other employees who have strong and legitimate, but non-religious, reasons for

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[218] *Id.* at 42.

[219] *See* William Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865 (1963); *see also* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125–26 (1982).

[220] 330 U.S. 1 (1947).

[221] *Id.* at 16.

[222] Larson v. Vallente, 456 U.S. 228, 245 (1982).

[223] Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983).

[224] 472 U.S. 703 (1985).

[225] *Id.* at 709–10. Although the Court's conclusion was expressly based on the Establishment Clause, *see id.* at 710–11, the opinion it quoted at greatest length was decided on the basis of free exercise. *See id.* at 710 (quoting Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.)).

wanting a weekend day off have no rights under the statute."[226] Similarly, *Larkin v. Grendel's Den, Inc.*,[227] invalidated a statute allowing churches to veto applications for a liquor license that were too close to a church's buildings, because the statute allowed the churches to "favor[] liquor licenses for members of that congregation or adherents of that faith."[228]

This social contract view that individuals cannot use their religion as a basis for making demands on the government has also influenced decisions denying free exercise demands on the government for affirmative relief in the management of government property or particular conduct in internal government operations. "'[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[229] *A fortiori*, the clause should not allow individuals to make demands on other citizens, who have free exercise rights of their own.

Finally, the Court has adhered to the Framers' conclusion that governmental support for religion, whether financial or promotional, jeopardizes religious diversity, which provides an important political guarantee of freedom of religion. As the Court observed in *Larson v. Vallente*,[230] in turn relying on Madison's *Federalist*, in a free government the "'[s]ecurity for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects.'"[231] Thus, Madison continued, "The degree of security in both cases will depend on the number of interests and sects . . . ."[232] These views have been recognized by the Court, albeit in a discussion of the Free Speech Clause.[233] Eliminating

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226 *Id.* at 710 n.9.

227 459 U.S. 116 (1982).

228 *Id.* at 125.

229 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). *See* Bowen v. Roy, 476 U.S. 693, 699 (1986) (the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development. . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."); *see also Lyng*, 485 U.S. at 449. Of course, citizens' religious status does not interfere with their claims under ordinary laws. *See* Baxter v. McDonnell, 49 N.E. 667, 671 (N.Y. 1898).

230 456 U.S. 228 (1982).

231 *Id.* at 245 (quoting THE FEDERALIST No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961)).

232 THE FEDERALIST No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961). *See also* THE FEDERALIST No. 10 (James Madison) (Clinton Rossiter ed., 1961).

233 *See* Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (because governmental support

even non coercive support to religion reflects, as *Larson* observed, "Madison's vision—freedom for all religion being guaranteed by free competition between religions—[which] naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference."[234] In *Zorach v. Clauson*,[235] the Court stated, "The government must be neutral when it comes to competition between sects."[236] Without such neutrality, it will be impossible for each sect to "flourish according to the zeal of its adherents and the appeal of its dogma."[237]

Protection against coercion is insufficient to maintain a multiplicity of sects, because it does not prevent people from being bribed or persuaded into adopting a dominant religion.[238] Thus, even when promotion does not interfere

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for religion could create a dominant religious view, threatening future religious intolerance, governmental promotion of religion is even worse than governmental promotion of non religious ideas). In Justice Brennan's words, "The Framers did not entrust the liberty of religious beliefs to either clause alone." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 256 (1963) (Brennan, J., concurring). *Cf.* RAWLS, A THEORY OF JUSTICE, *supra* note 15, at 325 (postulating that wealth must be distributed evenly so as to avoid skewing the political process).

The government cannot indoctrinate on behalf of religion, but the government can indoctrinate on behalf of non-religious values, so long as it does not compel a profession of the government's values. *Compare* Engel v. Vitale, 370 U.S. 421, 431 (1962) (prohibiting prayer in public schools even when children were excused because "the indirect coercive pressure upon religious minorities to conform . . . is plain") *with* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (requiring only that those who wished to abstain from the flag salute be permitted to do so). In addition to the textual differences, the difference in the treatment of religious speech and other speech may result from the greater need for acceptance of political ideas. For religious ideas, as Madison's remarks suggest, the interest of civil society is in creating a multiplicity of religions, none with a majority of the population as its adherents, not in consensus. THE FEDERALIST No. 51, *supra* note 232, at 324 (James Madison). By contrast, consensus in favor of a political system that provides avenues for peaceful change is desirable to avoid the strife that would result from violent disagreement about its legitimacy. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 199–200; Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350 (1991). No similar interest in consensus exists in favor of particular office-holders, so partisan political speech and religious speech fall into one category, and speech about democratic institutions falls into another.

[234] *Larson*, 456 U.S. at 245.

[235] 334 U.S. 306 (1952).

[236] *Id.* at 314 (quoted in *Larson*, 456 U.S. at 246).

[237] *Id.* at 313 (quoted in *Larson*, 456 U.S. at 246); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 382 (1985).

[238] Some have understood "the contribution of the Establishment Clause [to be] that

with the subjective sense of freedom of a person choosing among religions, preserving diversity requires that the government be prevented from bribery and promotion, as well as from coercion. Governmental support jeopardizes diversity because it can make the supported religion more attractive.[239]

III. THE IMPLICATIONS OF THE SOCIAL CONTRACT VIEW

The Supreme Court's treatment of the religion clauses needs to be revised in three respects. First, the Court must recognize that government, at least the federal government, cannot interfere with people's free exercise of religion unless it shows that the free exercise harms others. This harm cannot be the mere psychological harm that follows from knowing that other people are acting or believing in a way inconsistent with one's own views about religion. Thus, the social contract view provides an area of freedom within which individuals can act. That area is the area where their conduct does not affect others. Because no one else can complain that their rights have been infringed by such liberty, the social contract view provides the maximum protection to individual religious freedom that is possible without infringing on the rights of

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religious belief and practice are insulated even from government persuasion." Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 373 (1992). The analysis in the text suggests that the same result follows from the Free Exercise Clause, with appropriately broader protection to the rights of individuals.

[239] It might be argued that religious propaganda will not affect diversity, because "any danger that the people cannot evaluate the information and arguments advanced . . . is a danger contemplated by the Framers of the First Amendment." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792 (1978); *accord Buckley*, 424 U.S. at 48–49; Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295–96 (1981) (striking down limits on contributions to associations spending money in support of or against referenda). *Cf.* Virginia State Bd. of Pharmacy v. Virginia Consumers Council, Inc., 425 U.S. 748, 770 (1976) ("[I]nformation is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.").

However, this argument assumes that religious persuasion is solely rational. Deductive rationality cannot be primary when choosing among ends, and the Supreme Court has deprecated the role of rationality in choosing among religious beliefs: "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd., 450 U.S. 707, 714 (1981); *accord* United States v. Ballard, 322 U.S. 78, 86–87 (1944). *Cf.* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 381 (1978) (describing a realm of decision making that is neither strictly deductive nor wholly empirical). Where a result cannot be reached by deduction alone, the number of messages may be as influential as the reasoning they express.

individual religious freedom that is possible without infringing on the rights of others.

Second, the Court should recognize that the Free Exercise Clause prevents governmental promotion of religion, because that promotion harms those with competing views about religion. Those who would like to use such resources cannot complain, because they would not have had such resources before the government was formed. The language of inalienable rights makes clear that the government would not have been formed had it been known that the government would be able to promote one particular set of views about religion. This would reject the Court's "coercion" analysis, which is not used for the Free Speech Clause, thereby eliminating an inconsistency in the treatment of the two clauses.

Finally, the social contract view explains the proper way of dealing with claims for "exemptions" and "accommodations." Under the social contract view, the neutral position for the religion clauses is the state of affairs where no rights are invaded on the basis of religion and where individuals can behave as they like, so long as their conduct does not affect others.[240] This neutral position limits governmental regulation in the area of religion to acts that affect others and prevents individuals from advancing claims against the government on the grounds that not burdening their religion requires the government to give them something they could not have had in the state of affairs existing before the formation of the government.

The social contract view's general prohibition on self-regarding conduct limits the need for exemptions, with their intrusive requirements of sincerity or centrality.[241] Under the social contract view, where the government's demands for services, such as conscription, creates differential burdens, the government may, but need not, take steps to equalize the burdens. While the government can lift the burdens it imposes, it cannot use its power to promote religion, even on the theory that by doing so it is "accommodating" religion, because that violates individuals' inherent rights. When the government takes money from someone to support someone else's religion, it violates the religious rights of the person from whom the money is taken. This conclusion is supported not only by the social contract theory, but also by the Framers' express rejection of a right to inculcate morality.[242]

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[240] This neutral position may not be the correct one for other constitutional guarantees. *See infra* note 316.

[241] Thus, the view of some commentators that *Smith* is defensible because it eliminates the need for such scrutiny is based on the false assumption that only *Smith*'s approach prevents such scrutiny. *See* Wayne McCormack, *Subsidies for Expression and the Future of Free Exercise*, 1993 BYU L. REV. 327.

[242] *See supra* p. 30.

Many will find these conclusions troublesome. However, many of these objections have force not because the federal government is prohibited from regulating or promoting religious conduct, but because the incorporation of the religion clauses prohibits the states from regulating or promoting religious conduct.[243] This is especially true for the religion clauses' ban on the regulation of self-regarding conduct, because of the formerly preeminent role of state governments in "the ordinary administration of criminal and civil justice."[244] The most appropriate way to confront such fears is not to distort the meaning of the religion clauses, but to address the issue of incorporation directly.[245] To restrict the scope of First Amendment protections because of the Fourteenth Amendment's extension of these protections to state action would be an anachronism.

Despite the numerous advantages of the view of the Framers and that of the early Supreme Court decisions, many of the implications of the social contract view are at odds with the Supreme Court's views today. The next sections discuss these in more detail.

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[243] Jefferson, after all, did not see any conceptual problem in a strictly limited federal power over religion and full state power over religion. In his Second Inaugural Address, he stated:

> In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of Church or State authorities acknowledged by the several religious societies.

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 341 (Adrienne Koch & William Peden eds., 1944); *see also* Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.").

[244] THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST 45, at 293 (James Madison) (Clinton Rossiter ed., 1961).

[245] *See supra* note 43. *Cf.* Gary Leedes, *Rediscovering the Link Between the Establishment Clause and Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469 (1993) (focusing on the incorporation of the Establishment Clause and analyzing non-coercive support for religion under the Citizenship Clause of the Fourteenth Amendment). *But see* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accomodation of Religion*, 140 U. PENN. L. REV. 555, 568 n.35 (1991).

A. *The Social Contract View and the Regulation of Private Conduct*

Like *Smith*, the social contract view concludes that conduct directed against religion is invalid. The chief difference between *Smith* and the social contract view is that *Smith* provides no zone of protection for private conduct that does not infringe on the rights of others. The social contract view thus provides much broader protection.

Accepting the view of the Framers means overruling *Smith*, a case in which none of the Justices who addressed the issue concluded that peyote consumption affected the rights of others.[246] The Court may have ignored the historical interpretation of the Free Exercise Clause because it objected to a religious right to consume drugs, even if the consumption would not harm others.[247] As noted earlier, however, this seems to be based on an anachronistic view of the First Amendment.[248]

The Framers' view avoids the parade of horribles that the *Smith* Court provided as reasons why it could not protect religious conduct from government regulation. The Framers' view would allow the government to compel taxes or military service, prohibit manslaughter, control traffic, or protect the environment, all of which the *Smith* Court provided as examples of things it feared that a contrary holding would invalidate.[249]

A second major difference between the social contract view of the Framers and the *Smith* view is that *Smith* allows universal legislative exemptions, despite the possibility that these exemptions "will place at a relative disadvantage those religious practices that are not widely engaged in."[250] The social contract view is narrower. Under it, exemptions are generally not needed, because conduct is subject to regulation by the state only where it harms others. Where it does harm others, exemptions are improper and unconstitutional, because they allow people to assert religion as a basis for invading the rights of others.

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[246] *Compare* Employment Div. v. Smith, 494 U.S. 872, 905 (1990) (O'Connor, J., concurring) (concluding that peyote consumption was harmful to the person involved) *with id.* at 911–12 (Blackmun J., dissenting, joined by Brennan and Marshall, JJ.) (concluding that state had not shown that "peyote has ever harmed anyone.").

[247] *See id.* at 889 n.5.

[248] *See supra* Part II.B.2.

[249] *See Smith*, 494 U.S. at 889. Because conviction of a crime allows a restriction of liberties, the social contract view would not alter the Court's current curtailment of the religious liberties of prisoners. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); *see also* Mary A. Schnabel, Comment, *The Religious Freedom Restoration Act: A Prison's Dilemma*, 29 WILLAMETTE L. REV. 323 n.3 (1993).

[250] *Smith*, 494 U.S. at 890.

The purely private rights model of religion applies with greatest force to government action that transfers money or other benefits directly from some citizens to others. There are two problems that the neutrality model does not directly address. One is governmental demands for the money or services that it needs to function. The second is private demands asking that the government run its operations in a certain way.

In both of these cases, the correct rule is that exemptions are permitted, but not required. The Framers recognized that government would require money and services for its own support as part of the *quid pro quo* whereby one obtained a government to defend one's rights.[251] These were recognized departures from the ideal of a government that left intact private rights, so the social contract view provides no right to an exemption from these demands. However, the social contract view of neutrality allows the legislature to create exemptions from these rules in an attempt to restore an approximation of the status quo.[252] For example, conscription into the armed forces would unequally burden those whose religious beliefs prohibit military service, but an exemption from conscription for those whose religious beliefs prohibit military service would harm others. In such a case, there is no original, neutral position, only a choice between alternatives that are more or less non neutral.[253] In choosing among those alternatives, the legislature can properly consider freedom of religion, but can also consider the wisdom in drafting those who would refuse to fight, the resentment of those conscripted because of conscientious objection, the unfairness of allowing religions exempt from generally applicable rules to attract new adherents,[254] and the alternative service available for those seeking recognition for their conscientious objection. The selective service cases generally, but appropriately, defer to legislative judgment.[255] In the case of

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[251] *See supra* note 26. For the Framers' view as to taxation, see THE FEDERALIST No. 34, *supra* note 167, at 210 (Alexander Hamilton) ("[T]he exigencies of the Union [for taxation] could be susceptible of no limits, even in imagination."), and for their view as to conscription, see THE FEDERALIST No. 23, *supra* note 167, at 154 (Alexander Hamilton) (suggesting that one of the main purposes of the new federal Constitution was to enable the easier levying of troops).

[252] One supporter of neutrality concludes that exemptions are unjustified, but without discussing the possibility that exemptions might promote equality. *See* KURLAND, *supra* note 42, at 114.

[253] *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (plurality opinion) ("[W]hen [the] government directs a subsidy . . . that . . . cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community.").

[254] For Madison's objections to exemptions, see *supra* note 132.

[255] *See* Gillette v. United States, 401 U.S. 437, 462 (1971). Should the legislature

conscription, this is reinforced by the debates in the House of Representatives.[256] However, the removal of state-imposed burdens cannot be an excuse for providing religious groups a position more favorable than that they would have obtained in the original position.[257]

Other religiously motivated objections to work cause similar problems. The problem comes as much from the compelling of employment taxes in which the religious person may have a smaller return (if her claim is not honored) as it does from the rules governing unemployment compensation.[258] *Sherbert v. Verner*[259] may be defended on its facts, because those who had Sunday as their holy day were treated better than those whose holy day was Saturday.[260] Such legislative discrimination among religions is difficult to justify. However, *Thomas v. Review Board*[261] and *Hobbie v. Unemployment Appeals Commission of Florida*[262] are difficult to defend, because they mandate a special status for religious preferences. The correct treatment would have been to follow the precedent of the conscription cases.

The second problem, private demands on governmental resources, has arisen in two contexts. One is demands on governmental resources on internal government operations. As the social contract view would require, the Court has rejected such demands on resources[263] or any requests that the government

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attempt invidious discrimination among religions, the Equal Protection Clause or the equal protection component of the Due Process Clause would provide protection. *See* Larson v. Valente, 456 U.S. 228, 246 (1982) (applying strict scrutiny for discrimination among religions); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (stating that the federal government must satisfy equal protection requirements as part of due process).

256 *See supra* pp. 34–35.

257 *Cf. supra* note 244.

258 *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 254–65 (1993).

259 374 U.S. 398 (1963).

260 *See id.* at 410.

261 450 U.S. 707 (1981). Some may argue that the issue is not a matter of tastes, but of accommodating religious prohibitions. However, the distinction between the two may be difficult to make. For example, that Muslim families in Malaysia have lower incomes than ethnic Chinese families results from Islamic women's seldom working outside the home. *See* John Muellbauer, *Professor Sen on the Standard of Living*, *in* THE STANDARD OF LIVING 39, 45 (Geoffrey Hawthorn ed., 1987). The lower income can be seen as resulting from a religious prohibition, a difference in tastes, or from discrimination against women emanating from men. *See id.*

262 480 U.S. 136 (1987).

263 *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988). Such cases also pose difficulties for the thesis that accommodation, in the context of "government action [that] threatens to interfere with the exercise of religion . . . consists of exemption." Michael W. McConnell, *Accommodation of Religion:*

run its operations in certain ways.[264]

The other context is the creation of government entities in ways that coincide with the interests of religious groups. *Board of Education of Kiryas Joel v. Grumet*[265] presents a parallel problem of constituting the government. The social contract view suggests that separate groupings are permissible, but not required.[266] With respect to the structure of government, the pregovernment state does not provide a neutral position. The Court's resolution, as subsequent writers have recognized, focused on an equal-protection-like test,[267] akin to that which the Court subsequently adopted for racially motivated political boundaries.[268]

B. *The Social Contract View and the Governmental Promotion of Religion*

The Framers' social contract beliefs provided that government could not promote religion because this promotion conferred on its beneficiaries rights that they would not have had in the pregovernment state. They explained the desirability of prohibiting governmental promotion of religion by reference to the harm suffered by those compelled to provide support for the promotion.

The Framers were concerned with prohibiting governmental religious conduct, and they did not have recondite views of standing and harm. What the Framers absolutely prohibited, the Supreme Court tends to consider as two

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An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 686 (1992). In cases like *Lyng*, where the citizen seeks to avert threatened destruction of the characteristics of the property that make it religiously valuable, the governmental conduct that the citizen seeks will alter the condition of the property for all citizens, even though only some citizens view that alteration as religiously significant.

264 *See* Bowen v. Roy, 476 U.S. 693, 699 (1986).

265 114 S. Ct. 2481 (1994).

266 Of course, such a view would not allow a created entity to violate the Establishment Clause. *See* Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 111–12 (1996) [hereinafter *Uncovering the Village*]. In addition, the Supreme Court's analysis of racial segregation in districting would apply equally well to religion. *See* Miller v. Johnson, 115 S. Ct. 2475 (1995) (prohibiting drawing of districts primarily on racial lines); Shaw v. Reno, 509 U.S. 630 (1993) (same); Larson v. Valente, 456 U.S. 228, 246 (1982) (applying strict scrutiny for discrimination among religions); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (stating that the federal government must satisfy equal protection requirements as part of due process).

267 *See* Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 58–59 (1996).

268 *See Miller*, 115 S. Ct. at 2494; *Shaw*, 509 U.S. at 649.

separate issues. First, the Court asks whether there is harm suffered by the government's promotion of religion. Then, the Court asks whether the government can rightfully inflict that harm, as an "accommodation" of religious interests.

1. *The Harm from the Government's Promotion of Religion*

The social contract view recognizes that governmental promotion of religion interferes with individual rights. The Supreme Court's decisions disregarding promotional effects create inconsistencies between the First Amendment's religion clauses and its Free Speech and Press Clauses. The Free Speech Clause protects individuals against the taking of their money to support alternative views.[269] A failure to recognize rights against the government's promotion of religion gives religious speech less protection than ordinary speech.[270] Recognition that governmental support for religion interferes with the religious rights of those compelled to provide support and those disadvantaged by the government's support for hostile views will remove this inconsistency and provide several other advantages.

First, recognizing this interference means that these are free exercise rights, just as parallel claims against compulsory government non religious speech are free speech claims.[271] This reduces the importance of the correct interpretation of the Establishment Clause and the question of its incorporation. Even if the Establishment Clause were intended to protect state establishments,[272] the incorporation of the Free Exercise Clause guarantees that the government cannot use its power to support its views about religion.

Second, express recognition that support for one religion interferes with the rights of those with competing views would eliminate the confusion between financial and promotional support. Thus, the Court's reliance in *Lynch v. Donnelley*[273] on the minimal value of the crèche addresses a claim that the government is providing financial aid to religion, but ignores the government's promotion of an opposing set of religious views, which the Court had previously found to be unconstitutional, even when no public money was

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[269] *See, e.g.*, Keller v. State Bar, 496 U.S. 1, 10 (1990) (holding that unified bar members cannot be compelled to support the union's political positions); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 & n.31 (1977); *see also supra* note 202.

[270] *Compare* Buckley v. Valeo, 424 U.S. 1, 11–12 (1976) (allowing standing to challenge governmental expenditures under the Free Speech Clause) *with* Board of Educ. v. Allen, 392 U.S. 236, 248–49 (1968) (free exercise claim requires showing coercion).

[271] *See supra* Part II.A.4 ("Governmental Promotion of Religion").

[272] *See supra* note 245. *But see supra* Part II.A.2 and note 43.

[273] 465 U.S. 668, 681–82 (1984).

involved.[274] This considers only the financial effects of aid and disregards both the symbolic value of governmental support and the substantial secular purpose of educating children at both religious and secular private schools, which had no equivalent in *Lynch*. Both financial and promotional support violate the rights of those from whom money is taken or to whom support is not given, but comparing a case involving financial aid with one of promotion would also disregard the substantial secular purpose of educating children at both religious and secular private schools.

Third, recognizing symbolic endorsement would demonstrate the difficulties of the unequal use of governmental facilities, even if no financial expense could be identified. The choice of government, rather than commercially available facilities,[275] suggests that those seeking the governmental property desire the symbolic endorsement.[276] If those seeking to use governmental facilities argue that merchants refuse to rent property for fear of public reaction to their apparent endorsement of religion, this itself demonstrates the harm caused by governmental endorsement. However, even if religious groups seek no symbolic endorsement, but merely seek to save money by using free governmental property instead of market-rate private property, the religious use of nonpublic fora creates hostility among groups competing for the use of those fora,[277] and the competition reduces the benefit of the

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[274] *See* Stone v. Graham, 449 U.S. 39 (1980) (invalidating the posting of the Ten Commandments in public schools, even though the posting was funded by private money).

[275] A different rule might apply where private places were unavailable. *Cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) ("On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion . . . .").

[276] Thus, Professor Laycock observes,

> I ask why it is so important that the city put up the creche instead of the association of churches. Why must there be prayer at graduation, with a captive audience of children, instead of at a privately sponsored baccalaureate with an audience of volunteers? I think it is precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities.

Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 844, 846 (1992).

[277] *See, e.g.*, Colbert I. King, *Life Is Stronger*, WASH. POST, Apr. 6, 1996, at A17 (describing the San Diego Atheist Coalition's obtaining a permit to use a park for Easter Sunday as "an act of vindictiveness that lends new meaning to the word 'spite'"). In *Rosenberger v. Rector*, the Court apparently rejected the idea that government could pick

apparently free use of governmental property.[278]

Fourth, recognition that governmental support interferes with the promulgation of competing views would reverse the result in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[279] which upheld a gift of surplus governmental property to a group training people for the ministry.[280] The opinion assumes that not donating money to the government is the sole interest individuals have in preventing the support of religion. Because the gift of governmental property was made from government surplus stocks, not from funds created by annual appropriations, the Court believed the individuals did not have standing.[281] Recognizing that governmental support for religion harms those with competing views would

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and choose among speakers in crowded public fora, saying that "[i]t would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle." 115 S. Ct. 2510, 2519 (1995). This suggests that the Court is willing to allow competing religious views to object to the selection process, which implies that a recognition of their interest in preventing partisan governmental support. In addition, the Court observed that it was not faced with an objection from a student to the use of money for religious purposes. *See id.* at 2522.

[278] "Anguish, hardship and bitter strife" result "when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval." Engel v. Vitale, 370 U.S. 421, 429 (1962). This conflict results from rent seeking, "[t]he tendency of an expected gain to be translated into costs through competitive efforts." RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 37 n.3 (4th ed. 1992).

[279] 454 U.S. 464 (1982).

[280] *See id.* at 490. *Valley Forge*, by allowing the government to donate surplus buildings for immediate religious use, conflicts with prior cases that had prohibited federal aid to sectarian colleges to the extent that the aid could be used to construct a building that, twenty years after the grant could be "used for sectarian instruction or religious worship." Tilton v. Richardson, 403 U.S. 672, 683 (1971).

[281] The plaintiffs in *Valley Forge* sought to establish a right to oppose the sale based on their status as taxpayers and as citizens, but "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error." 454 U.S. at 485 (emphasis in original). Thus, the Court has not expressly held that one's rights are not infringed by the promotion of alternative religious views, but only has noted that the plaintiff had not alleged such an infringement. *See id.* at 472; *accord* Grove v. Mead Sch. Dist. No. 34, 753 F.2d 1528, 1531–32 (9th Cir. 1985) (the parents of children have standing under both the Establishment and Free Exercise Clauses to challenge the school's use of a book hostile to their religious beliefs, but a mere taxpayer does not). *But see* Harris v. City of Zion, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) (construing *Valley Forge* as holding that offense does not create standing). In any case, a doctrine that those damaged by the government's promulgation of competing beliefs have standing may obviate the need for exceptions from the general rule that taxpayers do not have standing. *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

have conferred standing on the plaintiffs, because the government's support of the Christian College diminished their ability to persuade others to adhere to opposing tenets.

Finally, showing that the governmental promotion of religious views interferes with individual rights provides a stronger reason for limiting governmental promotion than the mere fear that governmental promotion will lead to a future invasion of rights. As Madison observed, "[I]ndirect and remote considerations . . . will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole."[282]

2. *The Social Contract View and the Neutral Position*

The Framers recognized, as the Court often refuses to recognize, that governmental support for religion interferes with the rights of others, either because they are compelled to provide the support or because they are disadvantaged in the marketplace of religious ideas. The Court could decide that it had erred in declining to recognize that support for religion caused harm, but nonetheless uphold its decisions on the merits on the grounds that the legislature could balance the desires of recipients against the harm done to those hurt by the support. The claim of the majority in *Rosenberger* rests in part on the theory that such balancing is permitted by the Constitution.[283]

The Framers rejected this accommodation. The social contract view explains why. Under their view, the pregovernmental state provided the neutral position. With the pregovernmental state as the neutral position, government cannot transfer resources from one religious group to another, even if those running the government think that the recipients need it more. This analysis also explains why the Framers found no conflict between the Free Exercise Clause and the Establishment Clause. The conflict between the clauses exists

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[282] THE FEDERALIST No. 10, *supra* note 232, at 80 (James Madison).

[283] *See* Rosenberger v. Rector, 115 S. Ct. 2510, 2525 (1995) (denying that support for a religious publication "was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion"); *see also, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 657 (Kennedy, J., dissenting in part and concurring in the judgment) ("[T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. . . . Any approach less sensitive to our heritage would border on latent hostility toward religion . . . .") (citation omitted). To sustain his desired result in the case, in which a particular religious viewpoint received special treatment, Justice Kennedy defended, as he had to, the proposition that "government speech about religion is [not] *per se* suspect." *Id.* at 661. *See also* Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992).

only if people are entitled to have the government help them practice their religion.

For this reason, the claim that not acknowledging the role of religion would send a "clear message of disapproval" of religion,[284] is simply incorrect. By refusing to take money from some people to support the religious views of others or to become a partisan in religious debate, the government honors the religious rights of those who object to having the government used to promote other views.[285] In public fora, where official preference is not an issue, equality of speech is available to all.[286] Thus, the purportedly less favorable treatment for religious claims to governmental benefits or promotional assistance results from the favored status of religion. When the government transfers money from one group to another or uses its facilities, paid for by all, to spread one group's message rather than another's, both the favored and disfavored groups have religious claims.[287] Because the government cannot prefer some religious interests to others, there is no justification for the government's altering the status quo.[288]

The Supreme Court's departure from the Framers' status quo view of

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[284] *See Allegheny*, 492 U.S. at 657 (1989) (Kennedy, J., dissenting); *see also* Lee v. Weisman, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

[285] *See Allegheny*, 492 U.S. at 659–60. Citing the constitutional protection accorded religion would not have been an adequate explanation. The government has no duty to subsidize constitutionally protected activities. *See* Rust v. Sullivan, 500 U.S. 173 (1991) (government may prohibit expenditure of funds for abortion counseling, although giving funds for counseling of other views); Maher v. Roe, 432 U.S. 464, 475 (1977) (permitting government to subsidize childbirth, even when it refuses to fund abortion). For this reason, the majority's argument in *Rosenberger* based on the need to avoid discriminatory regulation of private speech is irrelevant. *See Rosenberger*, 115 S. Ct. at 2516.

[286] Where a public forum is involved, the freedoms of "speech and association protected by the First Amendment" require granting equal access to religious speech. Widmar v. Vincent, 454 U.S. 263, 269 (1981). The case did not involve "judgments as to how best to allocate scarce resources." *Id.* at 276. Rental at market rates would avoid the problem by using price to ration access. *See* Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5, 941 F.2d 45 (1st Cir. 1991).

[287] Although only money is transferred to the government, the transferor can object on free speech grounds. *See supra* pp. 24–27 and notes 177–203; Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981). *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) ("When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'").

[288] *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 153–55 (1974) (discussing the historical basis for determining the just distribution of entitlements).

neutrality in favor of a balancing approach removes the possibility of a principled resolution of the conflict between those who want the help and those who are disadvantaged because of it.[289] Under this view, the legislature would have discretion to recognize this claim, so long as it could characterize that claim as a claim for neutrality.[290]

The great trust that this approach places in the legislature is inconsistent with the countermajoritarian purpose of the Bill of Rights. Under this approach, the legislature could recognize virtually any claim a religious group advances, so long as the legislature's motive is to equalize burdens instead of promoting a particular religion or penalizing dissenters.[291] The judiciary cannot effectively review these legislative decisions, because they require balancing the centrality of parts of a religion against majoritarian needs, an inquiry not appropriate for the judicial branch.[292] Nor can one trust the political process to ensure that these exemptions demonstrate only the tolerance of the majority for the minority.[293] Overturning *Lemon v. Kurtzman*'s[294] requirement that the government act with a neutral purpose would only exacerbate this problem,

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[289] *Compare Allegheny*, 492 U.S. at 612–13 (1989) (limitations on government support for religion demonstrate the Constitution's respect for religion) *with id.* at 657 (Kennedy, J., dissenting in part and concurring in the judgment) ("[T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. . . . Any approach less sensitive to our heritage would border on latent hostility toward religion . . . .") (citation omitted).

[290] This view led the dissenters in *Allegheny* to accuse the majority of hostility toward religion because the majority refused to allow the legislature to grant religious groups' demands for support priority over others' rights not to support. *Id.* at 657–58 (1989) (Kennedy, J., dissenting).

[291] *See Uncovering the Village*, *supra* note 266, at 118–19.

[292] *See* Employment Div. v. Smith, 494 U.S. 872, 886–89 & nn.4–5 (1990). Much of the argument consisted of criticism of the courts' ability to draw lines between central and peripheral matters so as to allow balancing. *See id.* at 886–87. The rest of the argument criticized an effects-based test as impractical. *See id.* at 887–89 & nn.4–5.

The practical difficulty of relying on absolute principles of intent or effect in resolving free exercise claims leads some to adopt other concepts for determining burden. Professor Lupu advocates using common law concepts to determine whether governmental activity constitutes a burden. *See* Ira Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989). However, this approach functions only where the government imposes a burden. If, as this Article argues, individuals' rights are violated by the government's promotion of competing views, a common law concept of burden no longer provides a useful tool for measuring impingement on freedom of religion. Moreover, the concept of a common law approach is itself open to criticism. *See* SUNSTEIN, *supra* note 74, at 4.

[293] *See Uncovering the Village*, *supra* note 266, at 118–19.

[294] 403 U.S. 602 (1971).

because the purpose test provides a way to police legislative action intended to favor a particular religion without relying on the disproportionate effect of the action.[295]

Where the judiciary does wish to police legislative action, the unmanageable distinctions this view creates will generate formidable line-drawing problems.[296] Even Justice Kennedy acknowledges that the Establishment Clause "forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall."[297] The dividing line, in this view, is that too much persuasion becomes equivalent to "coercion."[298] However, the proper line of separation between permitted and excess persuasion even divided Justice Kennedy from those who joined in his *Allegheny* opinion which allowed governmental promotion of religion.[299]

Two reasons seem responsible for this departure from the original understanding. First, some Justices may have justified their departure from the Framers' approach by the belief that governmental promotion of religion really aids religion. However, history undermines any basis for such a belief. Barring the government from supporting religion means that various sects need no longer fear one another's control of the government, and the government's blunders will no longer discredit religion.[300] Although the United States has no governmental support for religion, it also has more support for and adherence to religion than almost any other country, including many countries with substantial establishments.[301]

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[295] Recent Supreme Court cases have avoided the *Lemon* test. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). Justice Scalia and others have advocated abandoning *Lemon*, and Justice Scalia counted six sitting Justices who had written or joined opinions condemning *Lemon* in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).

[296] *See* American Jewish Congress v. Chicago, 827 F.2d 120, 129 (1987) (Easterbrook, J., dissenting).

[297] County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., dissenting).

[298] *Id.* at 662.

[299] *Compare* Lee v. Weisman, 505 U.S. 577 (1992) (authored by Justice Kennedy, who wrote the *Allegheny* dissent in which Justice Scalia joined) *with id.* at 641 (Scalia, J., dissenting) (describing the majority's definition of coercion as an "ersatz, 'peer-pressure' psycho-coercion").

[300] *See supra* pp. 19–20 and notes 143–146.

[301] *See* JAMES CASTELLI & GEORGE GALLUP, JR., THE PEOPLE'S RELIGION: AMERICAN FAITH IN THE 90'S 33, 45, 47, 48 (1989) (U.S. is more religious than any country except Malta); GEORGE GALLUP, GALLUP REPORT No. 236 (1985); GARY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 15, 16 (1990).

Second, the Court may have been affected by the challenge to natural law and social contract views posed by the increasing popularity of utilitarianism. "[I]n the 1870s, natural rights and utilitarian justifications were approaching a head-on collision in the legal system."[302] "[T]he earlier natural rights justifications for the judicial function began to be overwhelmed by the overtly instrumental use of private law to advance utilitarian objectives."[303] This growth of utilitarianist influence also affected constitutional law interpretations: if the purpose of the government was the greatest good for the greatest number, then the legislature should be allowed to promote religion or accommodate it.[304]

However, this departure from the Framers' intent is in an area where the justifications for a utilitarian approach are strikingly weak. Most obviously, utilitarianism is likely to be substantially less protective of individual rights than a social contract view.[305] The more profound difficulty with the Court's adoption of a utilitarian perspective lies within the area of transfers on the basis of claims of need; even those who usually criticize status quo neutrality find it attractive, because of the potentially limitless and divisive claims that can otherwise be made.[306]

Any transfer based on the more extravagant taste of the recipients will be objectionable. The objections come from the difficulty of measuring claims for need and the undesirability of encouraging people to cultivate expensive tastes. Thus, someone whose expensive upbringing led to strong desires for pre-phylloxera wine and plover's eggs has no moral claims on us.[307]

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[302] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 112 (1992).

[303] *Id.*; *see also id.* at 36.

[304] *See* Roger Pilon, *Freedom, Responsibility, Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 520 (1993); *see also* Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305, 336 (1993) (discussing influence of utilitarianism on Holmes and other American legal thinkers).

[305] *See* RAWLS, A THEORY OF JUSTICE, *supra* note 15. Utilitarianism will not justify an equal liberty for all, because that also presupposes

> 'a certain similarity among individuals, say their equal capacity for the activities and interests of men as progressive beings, and in addition a principle of the diminishing marginal value of basic rights when assigned to individuals. In the absence of these presumptions the advancement of human ends may be compatible with some persons' being oppressed, or at least granted but a restrictive liberty.

Id. at 210–11.

[306] *See infra* n.316.

[307] *See* Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls' Theory of*

The objection becomes even more forceful when the extravagant tastes are religious preferences. In addition to the problems of any transfer, religious transfers will favor some religious groups at the expense of others.[308] People

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Justice, 70 J. PHIL. 245, 253–54 (1973); *see also* Richard J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFFAIRS 158, 185–94 (1990) (discussing the problem of expensive preferences). *But see* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 59 (1980) (people with genetic disadvantages or handicaps are entitled to extra resources to compensate for impediments that they face through no fault of their own); NORMAN DANIELS, JUST HEALTH CARE, ch. 1–3 (1985) (discussing compensatory health care); Amartya Sen, *Justice: Means Versus Freedoms*, 19 PHIL. & PUB. AFFAIRS 111, 120 (1990) (discussing individuals' disparate "power . . . to convert primary goods into the achievement of ends").

[308] Rawls describes this as a "receipt for religious controversy if not civil strife." RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 329–30. However, the problem of selection of different ends remains largely ignored. Even Amartya Sen, who generally criticizes Rawls's notion of primary goods for ignoring differences between individuals, focuses on individuals' "power . . . to convert primary goods into the achievement of ends," not on the discrepancies resulting individuals' selection of differing ends. Amartya Sen, *supra* note 307, at 120.

Rawls accepts Sen's and Arrow's argument that variations in needs for medical care and basic capabilities need to be addressed. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 183–84. However, his basis for distinguishing these from other impediments to achieving one's ends is unclear. He in part justifies his claim that those with expensive religious preferences should not have those claims satisfied at the expense of those with modest preferences by arguing that "variations in preferences and tastes are seen as our own responsibility," *id.* at 185, so that citizens must "have adjusted their likes and dislikes, whatever they are, over the course of their lives to the income and wealth and station in life they could reasonably expect." *Id.* at 186. *See also id.* at 329–30 (rejecting a claim for extra resources for those with expensive religions, because of the resentment it would cause).

Rawls's view that individuals must adjust their religious preferences "to the income and wealth and station in life they could reasonably expect" seems at odds with his statements elsewhere:

> [Religious, philosophical, or moral views] are understood to be forms of belief *and conduct* the protection of which we cannot properly abandon or be persuaded to jeopardize . . . . To be sure, there are religious conversions, . . . [b]ut presumptively these conversions and changes are *not* prompted by reasons of power and position, or of wealth and status, but are the result of conviction, reason, and reflection.

Id. at 311–12 (emphasis added). If Rawls is suggesting that those whose religious claims are consistent with middle-class or lower levels of wealth are entitled to redistribution, but not those with claims consistent only with higher levels, this would seem to be almost as divisive as the approach he rejects. The approach suggested in the text provides a way of rejecting such claims without the use of a comprehensive doctrine, albeit in the context of a

may have a religious objection to contributing money to others for the exercise of their religion.[309] In this case, with religious rights on both sides, a redistribution for religious purposes does not advance religion.[310] Attempting to scrutinize religious needs and religious objections would be even more intrusive than scrutinizing objections to transfers based on secular preferences and would still discriminate among people on the basis of their views about religion.

Although the Framers did not discuss the issue, probably because the role of the federal government was limited then, the social contract view's prohibition of governmental promotion of religion does not prohibit transfers of governmental funds for general purposes that private individuals spend on religion. Because the pregovernment position is the neutral position, the courts should examine one departure from the neutral position—the aid program—only in connection with the second departure, the taxes that fund it.[311] This perspective increases the likelihood that general programs will be sustained, because precluding recipients of aid from spending their money on religious purposes could seriously reduce individuals' religious expenditures.[312]

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political structure that depends, unlike Rawls's, on a historical approach to the social contract. *See* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 197–99 (1980), *reprinted in* RONALD DWORKIN, A MATTER OF PRINCIPLE 237, 242 (1985).

[309] *See* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 138 (unreasonable to use the public's political powers to enforce a particular religious doctrine). Professor Rawls says that denying a claim of this sort requires affirming a comprehensive view. *See id.* at 152–53. This is something he believes that government ordinarily should avoid. *See id.* at 152. ("[B]y avoiding comprehensive doctrines we try to bypass religion and philosophy's profoundest controversies so as to have some hope of uncovering a basis of a stable overlapping consensus.").

[310] *Cf.* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 341 (describing claims for assistance in exercising the basic liberties, such as the equal rights of conscience, as "self-limiting").

[311] *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 46–47 (1993); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 996–97 (1990) (criticizing as disaggregated neutrality the Court's practice of examining only one part of the governmental activities at issue). *But cf.* Hunt v. McNair, 413 U.S. 734, 742 (1973) ("To identify 'primary effect,' we narrow our focus from the statute as a whole to the only transaction presently before us.").

[312] *See* Donald Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 191 (explaining that high taxes depriving individuals of the right to spend money on religious purposes might require relief for parochial schools to maintain neutrality); William Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865, 871–72 n.25, 880 (1963) (explaining *Zorach's* approval of a released-time program for

Moreover, when an individual does spend such redistributed money on religion, the spending of money on religion results from *both* the governmental program and the individual decision. People are unlikely to perceive the governmental programs to be the cause of the religious expenditure, any more than they would consider a governmental decision to hire people to be the cause of the employees' religious expenditures.[313] This is especially true where the public can identify something that the government receives in return for the money that may ultimately be devoted to religious purposes.[314]

IV. CONCLUSION

In a perfect world, it would be possible to satisfy both claims for equal treatment and claims that individuals not have the government take their money for religious purposes. As Justice O'Connor observed in *Rosenberger*, "Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide

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schoolchildren as a measure to prevent the state's secular demands on children's time from eliminating religious activities, and noting the possibility of a similar effect with taxes). *Cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating high school attendance requirements for Amish children because it would destroy the Amish religion); Zorach v. Clauson, 343 U.S. 306, 324 (1952) (Jackson, J., dissenting) (discussing the problem of public programs eliminating time for religion); RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 194, 199–200 (discussing the limits of permissible mandatory education for children against a claim that this will interfere with the practices of religious sects that "wish to withdraw from the modern world.").

[313] It is incorrect "to view any aid ultimately flowing to the [religious school] as resulting from a *state* action sponsoring or subsidizing religion." Witters v. Washington Dep't of Servs. for Blind, 474 U.S. 481, 488 (1986); *accord* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). *Cf.* H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 63(2d ed. 1985) (explaining that causation "involves an implicit judgment on such imprecise issues as the *normal* condition of the thing concerned and the *abnormality* of what is identified as the cause"). The Supreme Court's observation in *Witters* that no other person had chosen to finance a religious education with the state aid at issue demonstrates the importance of unusualness. *See Witters*, 474 U.S. at 488.

[314] *See id.*, at 486–87; *see also* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 781 n.37 (1973); Quick Bear v. Leupp, 210 U.S. 50, 81–82 (1908) (holding that the United States could appropriate Sioux funds that the United States held in trust for educational purposes, even though the fund was created by annual appropriations and would be used at a Sectarian School). *Cf.* Speiser v. Randall, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.").

Awake, argues the University, violates the prohibition on direct state funding of religious activities."[315]

This is not a perfect world. It is impossible to satisfy both claims. However, the Framers' approach, which was well understood by their contemporaries ratifying the Constitution and Bill of Rights, provides a principled and historically sound resolution to the conflict.[316] Under that approach, the right of the transferor from whom money and the power to confer intangible support are taken outweighs the claim of the transferee. Any other approach creates conflicts to which there is no principled resolution and promotes a continuing battle for control of the state's power to promote and support religious views.

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[315] Rosenberger v. Rector, 115 S. Ct. at 2510, 2525 (1995) (O'Connor, J., concurring).

[316] Because the status quo analysis applies to the religion clauses for historical reasons, it may not apply to other clauses. Thus, the Equal Protection Clause puts an affirmative duty on the government to exclude the effects of private racial prejudice. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984). "[T]he equal protection clause is most easily read as a self-conscious rejection of status quo neutrality." SUNSTEIN, *supra* note 74, at 154. Thus, the Equal Protection Clause may contemplate a governmental commitment to equality that permits governmental conduct intended to equalize the status of its citizens with respect to religion. *Cf.* Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987) (permitting the government to lift from religious organizations the burden of statutes prohibiting discrimination on the basis of religion); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 712 (1985) (O'Connor, J., concurring, joined by Marshall, J.) (accepting requirement of reasonable accommodation as having a valid secular purpose and effect). Others have found prohibitions of religious discrimination justifiable philosophically, albeit in a context without an historically based neutral position. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 195.